LIVING TO FIGHT ANOTHER DAY: JUDICIAL DEFERRAL IN DEFENSE OF DEMOCRACY

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Even many years after *Marbury v. Madison*, and even in the face of the spread of aggressive constitutional court review in democracies around the world, the ability of courts to assert their authority against the political branches continues to demand explanation. Especially in newly minted democracies, and most so in countries emerging from authoritarian rule, how courts can engage the misuse of state power remains a bit of a mystery. This Article examines the hitherto under-studied phenomenon of judicial deferral as providing some insight into how courts acquire the institutional capacity to engage in robust judicial review and, in particular, how the deferral of implementation avoids direct political confrontations for the judiciary.

Unlike in the United States, constitutional court decisions around the world frequently delay the practical effect of their decisions. This Article explores various modes of judicial deferral, including suspended declarations of invalidity, doctrines of prospective overruling and progressive implementation, and more implicit or forms of delay involving narrow rulings paired with broad dicta. It also considers different functions served by judicial deferral, including practical concerns about smooth transition from one legal regime to another, democratic legitimacy and dialogue, and more political concerns about ensuring the legal and political preconditions necessary for effective judicial review; and the connections between these various 'first' and 'second' order modes and functions of deferral.

Once examined in this light, it turns out that various deferral-based strategies have been used by courts in some of the most successful systems of constitutional review in recent years, including in Germany, India, Colombia, and Indonesia. Finally, this Article turns to both the preconditions necessary for successful deferral and the corresponding risks when delay simply postpones an inevitable conflict.

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INTRODUCTION

American constitutional law assumes that a constitutional ruling yields an immediate controlling result. When earlier this year in *Obergefell v. Hodges*[1] the Supreme Court voted, by five-to-four, to recognize a constitutional right to same-sex marriage, the decision commanded that from that day forward gays and lesbians across America would be able to obtain a marriage license, or have their marriages recognized across state lines.[2] Lest there be any doubt about this, when a Kentucky county official, Kim Davis, refused to grant marriage licenses pursuant to the decision, a federal district court judge sentenced her to imprisonment for contempt of court.[3]

The presumption of immediacy places courts front and center in confronting established societal arrangements. In the United States, there are occasional departures from this presumption, as when the Court in *Brown v. Board of Education*[4] postponed the remedial implications of its decision, and then deferred the entire process for

1. 135 S. Ct. 2584 (2015).

2. *See, e.g.*, Scott E. Isaacson, Obergefell v. Hodges*: The US Supreme Court Decides the Marriage Question*, 4 OXFORD J. L. & RELIGION 530 (2015) (discussing the procedural history and nature of the remedy); Jason Pierceson, *From Kameny to Kennedy: The Road to the Positive Rights Protection of Marriage Equality in* Obergefell v. Hodges, 3 POL., GROUPS & IDENTITIES 703 (2015); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015). The same is true for many court decisions recognizing a right to same-sex marriage under state constitutions: *see, e.g.*, *Goodbridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). *Cf. Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (exclusion of same-sex couples from marriage violates the "Common Benefits" clause of the Vermont Constitution); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

3. Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [https://perma.cc/L55M-LHQJ].

4. 347 U.S. 483 (1954).

other institutional actors to assume responsibility "with all deliberate speed,"[5] an unfortunate invitation to decades of confrontation over integration. Nonetheless, *Brown II* is an outlier in American constitutional law, seemingly in conflict with the cardinal command of *Marbury v. Madison*[6] that, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[7]

Not so in other constitutional regimes. In countries such as Canada, South Africa, and Colombia, in contrast, equivalent landmark decisions recognizing a right to same-sex marriage had no such immediate impact.[8] Instead, Canadian and South African courts explicitly deferred the effect of decisions to recognize a right to same-sex equality, giving provincial and national legislatures twelve to twenty-four months to respond to their decisions.[9] This kind of explicit or 'first' order deferral by courts of the results of constitutional decisions is an increasingly common feature of constitutional decision-making around the world. Courts around the world frequently issue "suspended declarations of invalidity," or decisions deemed to have purely prospective effect. A second form of deferred judicial review, in a variety of comparative contexts, is the doctrine of "progressive realization" in the interpretation and enforcement of certain rights.[10]

Although our attention to this issue is prompted by newer constitutional regimes in which the power of the judiciary is uncertain, we note that even in the United States, courts on occasion use a form of judicial deferral through "prospective overruling" to delay a finding of constitutional invalidity for future pieces of legislation, leaving the law

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5. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

6. 5 U.S. (1 Cranch) 137 (1803).

7. *Id.* at 177.

8. *See Halpern v. Canada (Attorney General)*, [2002] 60 O.R. (3d) 321 (Can. Ont. Sup. Ct.); *Hendricks v. Québec (Procureure Générale)*, [2002] R.J.Q. 2506 (Can. Que. Super. Ct.); *Barbeau v. British Columbia (Attorney General)*, [2003) B.C.C.A. 251 (Can. B.C. C.A.); *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.); Corte Constitucional [C.C.] [Constitutional Court], abril 13, 2011, Sentencia C-283/11 (Colom.).

9. *See Halpern*, [2002] 60 O.R. (3d) 321; *Hendricks*, [2002] R.J.Q. 2506; *Barbeau*, [2003] B.C.C.A. 251; *Fourie*, 2006 (1) SA 524.

10. The United Nations, for example, has provided for "progressive realization and acknowledges the constraints due to the limits of available resources" in imposing obligations of the International Covenant on Civil and Political Rights on states with resource disadvantages. UN Committee on Economic, Social and Cultural Rights (CESR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 10, 8 Dec. 1999, E/C.12/1999/10, 8. Progressive realization requires states "take steps" to enforce protected rights, but relieves them of the burden of immediate implementation. *See infra* note 53 and accompanying text.

sub judice in effect.[11] More significant for our purposes is the role of the United States as home to an older, more implicit form of deferral, which emerged at the same time as the muscular declaration of judicial authority in *Marbury v. Madison*. Indeed the key example of this form of deferral is *Marbury* itself, which involved broad reasoning about the power of the judiciary, yet safely maintained that assertion of power ensconced in dictum, with a holding that left intact the challenged refusal of the Executive to give poor Marbury his desired commission as a Justice of the Peace.[12] Chief Justice Marshall's gambit was of immediate legal effect, but its political effect was delayed.

This kind of implicit, or "second-order" mode, of judicial deferral was perhaps *the* defining feature of *Marbury*: while boldly announcing a power of judicial review in respect of federal statutes, the Court protected itself from immediate political attack by finding that under the particulars of the case it was without jurisdiction to act.[13] Without this implicit deferral of the political consequences of the asserted power of judicial review, the history of judicial review in the United States may very well have looked quite different as a Federalist Chief Justice would have had to face down a newly elected Republican President. It was, we suggest, also an important part of the story of how the practice of judicial review has come to be accepted in a range of countries outside the United States.

The idea of judicial "deferral," as we shall term the strategy of severing the assertion of judicial authority from its immediate ramifications, remains largely unexplored by constitutional scholars, especially as a tool that may be used by courts to increase the effectiveness of constitutional limits on the actions of powerful political actors. In a constitutional design context, the idea of constitutional deferral has been explored in detail by one of us in collaboration with Tom Ginsburg.[14] This analysis suggests that deferral will often be a response to two related phenomena: the problem of "transaction costs" in processes of democratic constitutional drafting, and the risk of "error costs" associated with the making of entrenched constitutional choices,

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11. *See* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1906 (1993) ("When a court prospectively overrules an earlier decision, it decides that the new rule of law—the law announced in the overruling decision—will be applied only in cases that arise in the future; other cases will continue to be decided under the rule of law enunciated in the decision that is being overruled."). For another example, see the Indian Supreme Court's decision in *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India) (Siktri, C.J.), which is discussed *infra,* but which operated prospectively.

12. 5 U.S. (1 Cranch) 137 (1803).

13. *Id.*

14. *See* Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636 (2011).

absent sufficient information about downstream effects.[15] In the context of a doctrine emerging from the judiciary, however, the reasons or rationales for deferral seem quite different.

One aim of judicial deferral, which we label the "first-order" function of deferral, seems focused on concerns about the practical costs of immediately effective judicial decisions, or a desire to promote a form of democratic "dialogue" between courts and legislatures. Delayed judicial decisions, on this theory, provide government actors with an opportunity to make practical adjustments to government policies or programs, before a decision invalidating aspects of those policies or programs takes full effect, and thereby minimizes the practical disruption or inconvenience caused by court decisions. The deferral maps naturally onto the gap between the theory of liability and the practical problem of remedy. Delay also provides legislators with a natural window in which to revisit or amend prior laws, and thereby to contribute to a process of constitutional dialogue.[16] The aim of deferral, in each case, is to ensure the judicial decisions are narrowly tailored to achieving particular substantive goals or notions of democratic legitimacy.

Another, "second-order" function of judicial deferral, however, is more strategic or *Marbury*-like in aspiration: it is designed to temporize, to allow courts to assert themselves short of a frontal confrontation with the political branches. Time may increase the degree of background political or legal support for a court's reasoning before a court seeks fully to implement it. In many new democracies, there is often relatively weak political or legal support for courts playing a role in "democratic hedging." This can also pose a serious challenge to courts engaging in effective forms of hedging, which lead to actual compliance with constitutional limitations. Deferral of the political consequences of judicial decision-making, however, can help overcome this difficulty. Deferral puts the onus on the political branches to initiate a confrontation against a still unrealized potential for declaration of constitutional invalidity by a constitutional court. This creates a natural window of opportunity for political conditions to change in the court's favor or for increased support among lawyers for a court's reasoning in ways that ultimately significantly increase the chances of a court imposing effective limitations on democratic actors.

The aim of the Article, therefore, is to develop a better understanding of constitutional deferral in general and, in particular, as

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15. *Id.*

16. *See, e.g.*, Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537 (2005); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

a means by which courts may leverage their institutional authority to challenge the improper use of political power in a weak democracy. There are structural features of courts that not only counsel caution for bearing the power of neither the sword nor the purse, in Hamilton's famous formulation.[17] Rather, the fact is that almost all courts are governed by some doctrinal form of precedent.[18] This lends an inherent legitimacy to the accretive force of a consistent jurisprudential project over an extended period of time, via the decisions of different individual judges responding beyond just one case. Further, as individuals, most constitutional judges also have a longer guaranteed term in office than do political officers and may be well-positioned to wait out the implications of their actions.[19]

We do not suggest that judicial deferral is a universal strategy for courts, or a strategy for all times. A number of quite localized, context-specific factors can affect the viability of second-order deferral as a strategy—including the strength of doctrines of precedent, relative length of judicial term limits, and the way in which court decisions affect as well as interact with prevailing political conditions. Our aim in this Article, therefore, is ultimately simply to draw attention to various modes and functions of judicial deferral worldwide, as well as to highlight the degree to which deferral seems to have underpinned a variety of successful instances of judicial intervention by constitutional courts faced with threats to democracy.

The remainder of this Article is divided into four parts. Part I outlines the broader context or background to the judicial defense of democracy. Part II provides a typology of both the various *modes* of judicial deferral employed by courts in different constitutional systems, and the *functions* served by deferral in different contexts—i.e. the degree to which deferral by courts may increase the practical workability or democratic legitimacy of judicial decisions (first-order deferral), or the degree of acceptance or support for judicial decisions in ways that involve a more, explicitly or implicitly, political or strategic calculus by constitutional judges (second-order deferral). Part III explores the use of second-order deferral as a tool in a comparative context, particularly in four high-profile cases of the judicial defense of democracy—i.e. in Germany, India, Colombia, and Indonesia. Part IV

17. THE FEDERALIST No. 78, at 490 (Alexander Hamilton) (B. Wright ed., 1961).

18. *See* L. BLOM-COOPER & G. DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY 65 (1972).

19. For a comparison of common law precedent to civil law jurisprudence, see Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519 (2006); Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986).

explores the conditions under which deferral of this kind is most likely to succeed, as well as those under it is least likely to be desirable. Finally, we offer a brief conclusion.

I. JUDICIALIZED DEMOCRACY

We begin with the most immediate question in the assertion of judicial authority to stand down the political branches: how do courts get away with it? Much as apex constitutional courts have become a mainstay of modern democracies,[20] there is no obvious reason to suppose that they would prevail in confronting formidable political power. Lessons abound of courts that misplayed their hands, sought to thwart a too-powerful executive and were quickly relegated to irrelevance. In some cases, as with the Peruvian Supreme Court's efforts to discipline President Fujimori,[21] or with the Russian Constitutional Court's successive confrontations with Presidents Yeltsin and Putin,[22] the results were simply the shuttering of the courts as institutions and the increasing consolidation of autocratic power. Clearly, the mere fact of being a constitutional court, even one enabled with formal authority to review the legitimacy of the exercise of political authority, does not necessarily suffice. In constitutional law, as in other domains of political life, tactics and strategy matter. The aim is not so much normative in terms of justifying judicial interventions—though we have both written amply in defense of an assertive judicial role in the maintenance of democratic integrity[23]—but considering the

20. This is the main thesis of SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

21. *See, e.g.*, Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 Int'l J. Transitional Just. 384 (2009); Jo-Marie Burt & Coletta A. Youngers, *Peruvian Precedent: The Fujimori Conviction and the Ongoing Struggle for Justice*, NACLA Rep. on the Americas, Mar./Apr. 2010, at 6 (discussing the Peruvian government's attempts to establish new mechanisms of impunity for state agents accused of human rights violations).

22. *See, e.g.*, Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1791–846 (2006) (providing an account of the Russian Constitutional Court's decision that Yeltsin had violated the Constitution, followed by Yeltsin's suspension of the Court and Court-packing). For a discussion of Putin's confrontation with the Court, see CARLA L. THORSON, POLITICS, JUDICIAL REVIEW AND THE RUSSIAN CONSTITUTIONAL COURT 152 (2012) (describing the forced resignation of Justice Anatolii Kononov for defending a fellow justice who questioned Putin's actions). Judicial resistance has, however, been relatively muted under Putin as compared to Yeltsin. *Id.*

23. *See, e.g.*, ISSACHAROFF, supra note 20; Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007).

antecedent and less examined question of how this judicial role is carried out. Simply put, how do courts get away with their interventions into the political realm?

We propose that part of the answer might lie in how the power of judicial oversight is exercised. Judicial review of political authority exists across a spectrum of approaches ranging from the servile to the muscular. Our terminology should not be confused with advocacy of a particular approach, although our focus here is on approaches that entrench the judiciary as an institution without precipitating a headlong conflict with the political branches. Though we may criticize courts that fail to uphold the rule of law at critical moments, we are no less skeptical of courts that provoke a decisive confrontation with superior power. The willow may bend and the oak may stand upright against the wind—except of course when the oak does not. Nonetheless, we begin by setting forth the boundary markers of the spectrum of judicial responses with two South American cases showing the range from judicial abdication to extraordinary judicial reach. These are cases where courts took up a challenge from consolidated political power and responded in all or nothing fashion, with no ambition to postpone any decisive confrontation.

The first example comes from Argentina and the fascinating decision of the Supreme Court to resolve, as a matter of abstract review, the legal status of the so-called "September Revolution of 1930" in which the elected government of President Yrigoyin was overthrown by General Uriburu. The judgment of the Court, known as the *Acordada*, was the first formal judicial recognition, to the best of our knowledge, of a de facto government as the duly constituted legal authority in any country. For the court, the military's possession of all armed force and its consequent assumption of the duties to protect life, liberty, and property meant that the military government is "a de facto government whose title cannot be disputed judicially . . . ."[24] The "recognition" afforded by the Court was seen as necessary to the formalization of the military regime's ability to act lawfully to bind the state in all matters from criminal prosecution to public contracts to foreign affairs. The recognition was itself as much a matter of de facto reasoning—the military was in control—as was the claimed authority of the military in power. The Argentine Court simply formalized its sense of judicial powerlessness in the face of consolidated military authority. Nothing to be done as a practical matter meant the end of the judicial role.

24. CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, ACORDADA DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, LEGITIMANDO EL GOLPE DE ESTADO DE 1930 (1930) (Translation from the Argentine to the Australian by the authors).

Beyond the formal abdication of any judicial resistance to the illegitimate capture of state authority, the Argentine judgment is simply an overt and extreme expression of the assumption that courts ultimately are adjuncts of political power and helpless before first-order contestations of power. The longstanding American doctrine of non-justiciable "political questions"[25] represents a milder form of judicial self-limitation in the face of matters best entrusted to the political branches.[26]

The Argentine example of abdication corresponds to a different era. Moving forward to the end of the twentieth century, a new judicial order is evident. The political question doctrine in the United States was jettisoned well before *Bush v. Gore*,[27] yet even the remarkable resolution of the contested 2000 presidential election in the United States pales before the sorts of decisions thrust upon constitutional courts. Increasingly, the third-wave of democracy, Samuel Huntington's term for the expansion of democratic governance following the fall of the Soviet Union in 1989,[28] calls upon constitutional courts to protect what the Indian Supreme Court has termed the "basic structures" of democracy.[29] By the time the newly-minted South African Constitutional Court was called upon to weigh the constitutionality of the first post-apartheid constitution—and, moreover, to strike down certain aspects of it as insufficiently protective[30]—the era of Argentine-style judicial passivity was clearly over.

At the other extreme from the Argentine *Acordada* is the Colombian Constitutional Court's confrontation with President Uribe

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25. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). *See* ISSACHAROFF, *supra* note 20, at 155.

26. On the application of the political question doctrine, see, for example, *Baker v. Carr*, 369 U.S. 186, 209–18 (1962); THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005).

27. 531 U.S. 98 (2000). *See Baker v. Carr*, 369 U.S. 186 (1962); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

28. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

29. *See Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India); *Minerva Mills Ltd. v. India*, (1981) 1 S.C.R. 206 (India). *See also* SUDHIR KRISHHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009); Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175 (2010) [hereinafter Mate, *Two Paths*].

30. *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

over the question of a constitutional reform that would have permitted a third term in office. Upon assuming office in 2002, Uribe had transformed Colombia, rescuing order and security from insurgents and drug lords that had rendered Colombia a near-failed state. The Constitution was amended once in 2004 to permit a second term for Uribe, and that in turn led to a proposed re-amendment to permit a third presidential term.[31] Confronted with a constitutional reform that looked to enshrine a new Latin American *caudillo,* the Colombian Court issued a forceful short ruling, backed up by hundreds of pages of divided judicial opinions, that directly confronted Uribe and struck down the proposed constitutional amendment as contrary to deeper, though textually unspecified, constitutional principles: "The Court finds that the proposed amendment ignores some of the structural axes of the Political Constitution, such as the principle of separation of powers and the system of checks and balances, [and] the rule of alternation in office according to pre-established time periods."[32]

In the direct confrontation with political will, the Court's judgment prevailed. Uribe stepped aside, new elections followed, and Colombia institutionalized the rotation in office emblematic of healthy democratic governance. We will return to the fascinating Colombian example to probe more fully how the Colombian Court was able to amass sufficient authority for such a direct confrontation.

Of course, how and whether courts can succeed in enforcing democratic limitations of this kind will depend on both carefully crafted local doctrines and the existence of certain favorable political conditions. The two factors may also interact in complex ways: appropriately crafted doctrines may not only give space for, but also actively promote, the development of favorable political conditions. And equally, the nature of particular legal doctrines, as well as external political factors, may contribute to a political backlash against a court. To focus on courts, as an institution capable of protecting democracy, therefore, is to analyze only part of the complex institutional matrix necessary for the success of such an enterprise.

For present purposes, however, we begin with the historic fact of wide constitutional acceptance of the justiciability of core political structures. This can be seen in judgment on the validity of the South

31. *See* Eduardo Posada-Carbó, *Colombia After Uribe*, 22 J. DEMOCRACY 137, 138 (2011) (describing Uribe's term in office and attempts to prolong it).

32. Corte Constitucional [C.C.] [Constitutional Court], septiembre 8, 2010, Sentencia C-141/10 (Colom.) (translation by the authors). Por medio de la cual se decide sobre la constitucionalidad de la ley 1354 de 2009, de convocatoria a un referendo constitucional (By which it decides on the constitutionality of Law 1354 of 2009, to call for a constitutional referendum).

African Constitution,[33] or the amendability of the Colombian Constitution.[34] What might have seemed inconceivable when many democracies were minted in the early and mid-twentieth century is no longer extraordinary. A growing number of constitutions worldwide contain an explicit commitment to "democracy," or to democratic forms of self-government. Post-1989 in particular, constitutions are also frequently drafted in circumstances where all parties share an interest in promoting democratic forms of government. The question is simply how robust, and enduring, democracy will prove to be.

How a commitment to constitutionally-guaranteed democracy might be discharged remains the fraught question. A key requirement for the consolidation and endurance of democratic self-government is the existence of meaningful democratic competition.[35] Without such competition, the party in power at the time a constitution is first enacted will face little subsequent chance of being thrown out of power—no matter how bad their performance in office. A political system that begins life as fully democratic may thus readily descend into one that is quasi-authoritarian or autocratic, or simply involves "one man, one vote, one time . . . ."[36] Moreover, in many newly-democratic states, there is often natural pressure toward "dominant" or single-party rule.[37] A party that helps create the conditions for democratic self-rule will often enjoy sufficient popular support, such that it will face little natural political competition in the early years of a new constitution's operation. Over time, the party may also use various levers of government to entrench itself in power, thereby making it increasingly difficult for new parties to enter and compete against it, or create a viable opposition.[38]

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33. Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

34. *See* Corte Constitucional, *supra* note 32.

35. *See, e.g.*, Albert Weale, *Party Competition and Deliberative Democracy, in* DEMOCRATIC POLITICS AND PARTY COMPETITION 271 (Judith Bara & Albert Weale eds., 2006); Philip Edward Jones, *The Effect of Political Competition on Democratic Accountability*, 35 POL. BEHAV. 481 (2013); Gary S. Becker, *Competition and Democracy*, 1 J.L. & ECON. 105 (1958).

36. This phrase is attributed to former Assistant Secretary of State and United States Ambassador to Syria and Egypt Edward Djerjian. *See, e.g.*, Ali Kahn, *A Theory of Universal Democracy*, 16 WIS. INT'L L.J. 106 n.130 (1997).

37. *See, e.g.*, Frederick C. Engelmann, *Uncommon Democracies: The One-Party Dominant Regimes*, 24 CANADIAN J. POL. SCI. 177, 177 (1991); Kenneth F. Greene, *The Political Economy of Authoritarian Single-Party Dominance*, 43 COMP. POL. STUD. 807, 812 (2010); Meltem Muftuler-Bac & E. Fuat Keyman, *Turkey Under the AKP: The Era of Dominant-Party Politics*, 23 J. DEMOCRACY 85, 85 (2012).

38. On the entrenchment of single parties, see CLEMENS SPIESS, DEMOCRACY AND PARTY SYSTEMS IN DEVELOPING COUNTRIES: A COMPARATIVE STUDY OF INDIA AND SOUTH AFRICA 99 (2009). *See generally* Heidi Brooks, *The Dominant Party System: Challenges for South Africa's Second Decade of Democracy*, EISA OCCASIONAL PAPER

A key question, therefore, is what if anything can be done by courts, or other independent constitutional institutions, to help check this potential for ongoing control, or entrenchment, by a dominant party in a new democracy. In a United States context, one of us has argued (with Richard Pildes) that federal courts have the potential to play a central role in promoting, and guaranteeing, the conditions for competitive electoral democracy.[39] To do this, courts in the United States would need to articulate a set of doctrines to protect the "rules that structure partisan political competition," as opposed to the characteristic judicial attention to the articulation of constitutional rights. In a comparative context, one of us has again argued, as has Sujit Choudhry, that constitutional courts can play a similar role in promoting democratic competition against a background of dominant party control of the political process.[40]

To date, however, this literature has largely focused on the question of whether, not *how*, courts should play this role.[41] Between the *Scylla* of abdication of the Argentine sort and the *Charybdis* of frontal confrontation in Colombia, there must be mediating strategies available to courts if they are indeed to succeed in shoring up the institutions of democracy.

II. THE *MARBURY* STRATEGY, REVISITED

In any new or fragile democracy, the problem of confrontation with political authority is compounded by the weakness of institutional authority. New democracies often do not come into existence with developed institutions of governance and are prone to the consolidation of strong executive or dominant party rule. There may be limited political tradition within a particular country of constitutional review by

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25 (2004), https://www.eisa.org.za/pdf/OP25.pdf [https://perma.cc/PE4W-7WXS]; THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY (Hermann Giliomee & Charles Simkins eds., 1999).

39. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 2–3 (4th ed. 2012); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998).

40. Sujit Choudhry, *"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 18 (2009); Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 965 (2011).

41. *See, e.g.*, Choudhry, *supra* note 40, at 34 (identifying five different tools available to a court in seeking to combat dominant party political influence, including doctrines of "anti-domination, anti-capture, non-usurpation, anti-seizure, and anti-centralisation," but treating these doctrines largely as complements, rather than potentially distinct strategies, with different potential strengths and weaknesses). *See also* Issacharoff, *supra* note 40, at 1010–11 (focusing on the idea of "democratic hedging" by courts, without making fine-grained distinctions between these strategies).

courts, particularly the kind of strong form review required for courts to engage in successful forms of democratic hedging, and thus limited political support for compliance with court decisions.[42] There may also be quite weak or incipient forms of opposition to political actors who pose a threat to the consolidation of democracy: social movements may be at a relatively early stage of development or organization, given a long or recent history of authoritarian rule, or the suppression of civil society. And the political opposition itself may be relatively weak or disorganized.

Sometimes, the weakness of the political opposition may be mirrored by weakness in the dominant political coalition. Even the most successful political parties, or actors, may be quite weak in some new democracies, in ways that create space for other institutional actors (including courts) to act.[43]

In other cases, however, the success of the dominant political party in helping achieve the goals of national independence, or liberation from a prior autocratic or oppressive regime, will often give that party a natural period of electoral strength, or even dominance.[44] A dominant party that controls access to government benefits, including employment and other patronage, makes it difficult for new parties to form, or for a faction within the party to splinter off and still receive meaningful electoral support. In countries transitioning to democracy, it may also take time for individual political actors to gain relevant political experience, and therefore also the skills and reputation necessary to form a credible opposition.[45]

The legal culture may also be unaccustomed to courts exercising strong powers of judicial review of this kind, in ways that reduce support for a court's decisions even amongst lawyers and the legal

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42. In some national settings, premature efforts to exercise full judicial review may actually backfire. *See* Javier Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002*, 10 DEMOCRATIZATION 70, 88 (2003) ("The lesson of the Chilean judiciary's retreat from an activist use of its powers of constitutional review and the short-lived activism of other Latin American states is that a *premature introduction of judicial review of legislation in non-consolidated democracies could actually make things worse, by ending judicial independence*.") (emphasis original).

43. *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 135–37 (2001).

44. *See, e.g.*, Posada-Carbó, *supra* note 31 and accompanying text (discussing the example of President Uribe of Colombia).

45. On the difficulties a dominant party system presents to democratic transition, see, for example, POLITICAL TRANSITIONS IN DOMINANT PARTY SYSTEMS: LEARNING TO LOSE 9 (Joseph Wong & Edward Friedman eds., 2008); Shaheen Mozaffar, *Understanding Party Dominance in Africa, in* CHALLENGES TO DEMOCRACY BY ONE-PARTY DOMINANCE: A COMPARATIVE ASSESSMENT 1, 10 (2006).

academy. As the lawyers movement in Pakistan so clearly demonstrated in 2007, the support of lawyers can also be critical to a court's independence and effectiveness: when President Musharaf tried to remove Chief Justice Chaudhry, in part to avoid the likelihood that he would render a forceful decision seeking to limit the President's own powers, mass demonstrations by the country's lawyers helped ensure that he was reappointed.[46] Even the unusual sight of lawyers mobilizing in street demonstrations was sufficient to permit the continued judicial independence needed to permit authoritative judgments curtailing the power of the political branches. In many countries, lawyers also operate as a more subtle or invisible, but equally important, source of support for the enforcement of judicial decisions: when court judgments have broad support from lawyers and the legal academy, it will often be difficult for the executive to avoid complying with those decisions; whereas if the decisions are the subject of widespread criticism, there will be much greater scope for executive disobedience.[47]

In these circumstances, the question will be how courts can craft their approach to judicial review in ways that are actually effective, or help promote democracy—rather than undermine it. Judicial delay, we suggest, may also be one important answer: *Marbury v. Madison* may offer not only the ends of judicial authority, but also serve as a leading example of the means to realize it.

A. Modes of Judicial Deferral: First-Order versus Second-Order

Examined in a comparative context, the most well-known tool for judicial deferral is a form of remedy known as a "suspended declaration of invalidity." The Supreme Court of Canada (SCC), for example, has held that its powers to grant an "appropriate and just" remedy under the Canadian *Charter of Rights and Freedoms* allowed it to delay the

46. *See* Kersi B. Shroff & Krishan S. Nehra, *Suspension and Reinstatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial Independence?*, LIBRARY OF CONGRESS (Aug. 2007), http://www.loc.gov/law/help/pakistan-justice.php [https://perma.cc/PS3A-CQZV]; Saeed Shah, *Jubilation as March on the Capital Forces President to Climb Down over Law Chief*, GUARDIAN (Mar. 16, 2009), https://www.theguardian.com/world/2009/mar/17/pakistan-protest-chaudhry-islamabad [https://perma.cc/8SJE-G3LX]. But note also concerns that Chaudhry himself may not always have acted fully in accord with notions of judicial independence, or principled judicial decision-making. *See, e.g.*, Shoaib A. Ghias, *Miscarriage of* Chief *Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 LAW & SOC. INQUIRY 985, 992–96 (2010); Wischa (Geng) Ngarmboonanant, *Dictatorial Tendencies: Chaudhry and Pakistan's Supreme Court*, YALE REV. INT'L STUD. (Jan. 2014), http://yris.yira.org/essays/1236.

47. *See* Adama Dieng, *Role of Judges and Lawyers in Defending the Rule of Law*, 21 FORDHAM INT'L L.J. 550, 555–57 (1997).

effect of a declaration of constitutional invalidity "until Parliament or the provincial legislature has had an opportunity to fill the void" created by the declaration.[48] Similarly, the post-apartheid Constitution in South Africa allows a similar form of deferral, as have several constitutions drafted over the last few decades. Thus, in South Africa, the Constitutional Court (CCSA) has express power to issue "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."[49]

The effect of a declaration of this kind is to invalidate a particular law found to be inconsistent with a constitutional obligation, but then to suspend the effect of this finding for a defined period of time. While there are fleeting examples in American jurisprudence of delays in the implementation of judgments,[50] the practice appears inconsistent with the general dominance of constitutional decrees through post-*Marbury* judicial review.[51] In other constitutional cultures, however, including in other stable constitutional settings, the practice is far more central to the relation between the judiciary and the political branches.

A second, quite different form of deferred judicial review, in a variety of comparative contexts, is the doctrine of "progressive realization" in the interpretation and enforcement of certain rights. The idea has its origins in international human rights law. Article 2 of the International Covenant on Economic, Social and Cultural Rights provides that states parties must take steps with a view to "achieving progressively the full realization of the rights recognized" in the Covenant.[52] This idea of progressive realization has also been applied by constitutional courts in the interpretation of a variety of rights guarantees in national constitutions.

Most famously, in South Africa in *Grootboom*,[53] the CCSA relied on a notion of progressive realization to resolve a challenge to the ongoing failure of post-apartheid South Africa to meet the constitutional guarantee of "adequate housing."[54] The Court distinguished the

48. *Schachter* v. *Canada*, [1992] 2 S.C.R. 679, 684 (Can.).

49. S. AFR. CONST., 1996, s 172.

50. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

51. There are more examples of suspended judgments at the state court level, as seen in the decisions of the Vermont Supreme Court in *Baker v. Vermont*, 744 A.2d 864 (1999), and the New Jersey Supreme Court in *Lewis v. Harris*, 908 A.2d 196 (2006). For example, *Baker v. Vermont* held that existing state laws in regard to marriage violated the state equal protection clause, but that the effect of its decision should be suspended for a "reasonable period" to allow the legislature "to consider and enact implementing legislation." *Baker*, 744 A.2d at 887.

52. 993 U.N.T.S. 2.

53. *South Africa v. Grootboom* 2001 (1) SA 46 (CC).

54. *Id.* at 69–70.

justiciability of socio-economic rights from the question of their enforcement.[55] In terms of a remedy to the persistent inability to meet minimum standards of decency, the Court allowed the state to realize the constitutional objectives consistent with available resources and with consideration of the many competing claims for government funding and attention.[56] The Court thus rejected the idea that it should engage in strong-forms of judicial review designed to enforce a "minimum core" aspect of the right of access to housing under Article 26(2) of the South African Constitution, and instead preferred a more gradualist approach, based on the notion of "reasonable" implementation by the government.[57] More recently, in Kenya, in *Advisory Opinion No 2 of 2012*,[58] the Supreme Court of Kenya relied on a similar approach to interpreting provisions regulating the gender balance of Parliament, holding that the obligation of the state under Article 27(8) of the 2010 Kenyan Constitution "to take legislative and other measures to implement the principle that not more than two thirds [of] members of elective or appointed bodies shall be the same gender" was to be interpreted in light of a principle of progressive realization.[59]

In the United States, by contrast, such deferral is less common, although there is a doctrine of "prospective overruling" that allows a finding of constitutional invalidity to be delayed to future cases without effect on cases pending or completed at the time of the court's ruling.[60] At times, United States' courts have recognized an exception to this for the individual litigant party to the case: the justification for this kind of "selective" approach to prospective overruling is that it provides a

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55. *Id.* at 59–61.

56. *Id.* at 70; *See, e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 243–44 (2009); Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, CHICAGO UNBOUND (John M. Olin Law & Economics Working Paper No. 124, 2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657 [https://perma.cc/GC5D-JVHW].

57. *See* Sunstein, *supra* note 56, at 9; Fons Coomans, *Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court*, 65 ZAÖRV 167, 181–83 (2005).

58. In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion No. 2 of 2012, Sup. Ct. of Kenya, (W. Mutunga, C.J.) (Dec. 11, 2012).

59. *Id.* at § A[2].

60. The origins of the doctrine are found in *Sunburst Oil & Refining Co. v. Great N. Ry. Co.*, 7 P.2d 927, 929 (Mont. 1932). The best example involves the limited immediate effect of the incorporation of federal criminal procedure standards after *Mapp v. Ohio*, 367 U.S. 643 (1961). *See, e.g.*, Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U. PA. L. REV. 650 (1962); Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting*," 51 MARQ. L. REV. 254, 265 (1968).

reward to individuals for bringing a case before the courts, and thus an incentive for individuals to enforce the constitution.[61] But as noted at the beginning of this Article, the question of constitutionality in the United States is presented in a more binary way—as an either/or question, not susceptible to selective or partial application.

In effect, however, United States' courts have long reached decisions that defer the effects of certain aspects of their decisions. In *Marbury* itself, the Court announced broad powers of judicial review in respect of federal legislation, but deferred the legal and political effect of this reasoning by holding that it lacked jurisdiction to grant an order for mandamus. This kind of *implicit,* or "second-order" deferral, is also a common feature of constitutional decisions in the United States. The Supreme Court often announces quite broad general principles, but then proceeds to rule far more narrowly in disposing of the specific controversy before it. At the level of its reasoning, it is quite maximalist, whereas at the level of concrete legal outcomes or remedies, it is far narrower or more "minimalist."[62] This combination, of breadth in reasoning and narrowness in result, is also a classic form of judicial deferral—i.e. a form of partial confrontation of an issue by a court, combined with partial avoidance or delay at the level of a concrete legal remedies, or the immediate legal and political *consequences* of a ruling.

Each mode of deferral will have a somewhat different logic and structure, which makes it better suited to some constitutional contexts rather than others. The four different modes of deferral are certainly not entirely equivalent or synonymous. At the same time, the use by courts of one, or other, mode of deferral will often depend on national legal traditions, not simply these more functional considerations. If a particular judicial tool finds support in the text of a constitution, or existing legal traditions, it may be used quite frequently as a means of deferral in a jurisdiction, whereas if it is less well-recognized, it may be used far less often.[63] Deferral, in other words, is an extremely common phenomenon worldwide, though it often takes quite different forms in each country.

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61. *See Stovall v. Denno*, 388 U.S. 293, 300–01 (1967).

62. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). For discussions of the Roberts Court in these terms, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181; Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL'Y REV. 1 (2007); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 322–27 (2012).

63. Another relevant factor may be the degree to which the court engaged in review is a specialized versus generalist constitutional court, and has discretionary control (or not) over its jurisdiction.

B. The First-Order versus Second-Order Aims of Deferral

Different instances of judicial deferral also have a broad variety of aims and purposes, which have quite different connections to commitments to democracy. For "first-order" forms of deferral, there are generally two broad aims to delaying implementation of a court's reasoning: first, reducing the disruption or practical costs associated with transitioning to a new legal regime; and second, promoting a more active "dialogue" between courts and legislatures. In cases that involve criminal law, there is the further concern that a retrospective ruling would provide grounds for collaterally reopening a large number of cases. The criminal context thus provides numerous examples of this first kind of first-order deferral in action.[64]

In Indonesia, for instance, in the *Bali Bombing Case*, a case as high profile in Indonesia as the September 11, 2001 attacks in the United States or the July 7, 2005 bombings in London, the Indonesian Constitutional Court struck down the use of emergency laws—but only on a prospective basis.[65] This was also despite the fact the case was heard prior to any direct appeal, and not simply by way of collateral challenge to an otherwise final decision of an appellate court.[66] The fear was that the decision might mandate the release of the convicted leaders of the attack, which had left more than 200 people dead, and 200 seriously injured.[67] The concern was compounded because the conditions of detention and interrogation under the emergency laws might have foreclosed effective prosecution of these individuals under more ordinary criminal laws. The Indonesian Court thus blunted the hostility to its ruling by announcing that its decision should be understood to have purely prospective effect.[68]

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64. *See, e.g.*, *R. v. Swain*, [1991] 1 S.C.R. 933 (Can.). The Court in *Schachter v. Canada*, [1962] 2 S.C.R. 679, 715 (Can.), also re-affirmed this approach, suggesting that delaying the effect of a declaration of invalidity was "clearly appropriate where the striking down of a provision poses a potential danger to the public."

65. *Kadir v. Indonesia*, Case No. 013/PUU-I/2003, Decision, Indonesian Constitutional Court, 31–32 (July 22, 2004), http://www.mahkamahkonstitusi.go.id/index.php?page=web.Putusan&id=1&kat=1&cari=013%2FPUU-I%2F2003 [https://perma.cc/L39Y-4XRJ].

66. *See* SIMON BUTT, THE CONSTITUTIONAL COURT AND DEMOCRACY IN INDONESIA 106–07 (2015). *Contra, e.g.*, *Teague v. Lane*, 489 U.S. 288, 315–16 (1989) (finding that prospective overruling is often justified in cases of collateral challenge, rather than direct review).

67. Those who carried out the attack were also convicted under the Act, but sentenced to death, and were not party to the constitutional action.

68. *See* BUTT, *supra* note 66, at 106–07; Simon Butt & David Hansell, *The Maskyur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003*, 6 AUSTL. J. ASIAN L. 176, 180–81 (2004).

In public law settings outside the criminal context, a similar concern exists over the possibility of creating a legal vacuum, even in the absence of a public safety concern. Consider *Reference Re Manitoba Language Rights*,[69] in which the SCC held *all* of the laws of Manitoba to be constitutionally invalid for failure to comply with the bilingual language requirements under the Canadian Charter.[70] Clearly, the elimination of all law in Manitoba would be an act of judicial lunacy and the Court reasonably deferred the remedial effect of its ruling until Parliament had a chance to remedy the defect.[71]

Beyond the specter of a complete vacuum of legal authority in *Manitoba*, the broadest defense of progressive realization of judicial mandates is that more immediate judicial relief would simply be impractical.[72] Examples are readily drawn from cases in which the government could not possibly satisfy an immediate broad decree, including an immediate requirement of universal access to emergency housing, in cases such as *Grootboom*, or an immediate increase in female representation in Parliament in Kenya, in *Advisory Opinion No 2 of 2012*. Deferral in both cases had an important practical dimension: in South Africa, it was simply not realistic, given the number of people who were homeless at the time, for the Court to require that all South Africans immediately be provided with short-term shelter. Any realistic program to provide emergency shelter would have required months to implement and might have prompted further resorts to violent land seizures by those claiming a judicial mandate. Similarly, in Kenya, as the Supreme Court itself pointed out, it was not necessarily feasible for the Court to order the immediate implementation of the mandated one-third female representation in Parliament: to achieve this goal, action was required by political parties to increase the number of female representatives in winnable single-member constituencies, or alternatively, by Parliament, to amend the Constitution to increase the number of "reserved" seats for women.[73]

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69. [1985] 1 S.C.R. 721 (Can).

70. *Id.* at 722–23.

71. *See also Dixon v. British Columbia* [1989] 35 B.C.L.R. (2d) 273 (Can.), wherein the Supreme Court of British Columbia invalidated various electoral boundaries in British Columbia, but suspended the effect of the declaration. *Cf. Schachter v. Canada*, [1962] 2 S.C.R. 679, 715 (explicitly linking this case to a concern about "the rule of law").

72. *Cf. also* Roger J. Traynor, *The Well Tempered Judicial Decision*, 21 ARK. L. REV. 287, 298 (1967) (analyzing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), in these terms, and suggesting that "the extraordinary technique of the *Brown* decision, allowing an unspecified time for adjustment, was the only possible way of insuring orderly transition from an old social order to a new").

73. Supreme Court of Kenya, *Advisory Opinion No. 2 of 2012*, KENYA L., ¶¶ 68–71, http://kenyalaw.org/caselaw/cases/view/85286 [https://perma.cc/2PHR-8HB3]

For constitutional "dialogue," deferral allows the legislature to respond to a court's reasoning before a remedial decree is formulated. The fact is that constitutional requirements often under-determine the precise legislative or policy change required in a particular area of law. The constitution may set clear parameters on the *range* of changes that are permissible in a particular context, but often, it will say little about which choice should be preferred within that range. There are also good reasons in these circumstances for courts to defer to legislatures in determining how best to remedy a particular constitutional violation: legislatures frequently have both superior information and expertise available to them, and stronger democratic legitimacy in making decisions of this kind. And as Kent Roach notes, remedial delay in these circumstances explicitly "remand[s] issues to the legislature to allow it [to] select among the range of options that would satisfy the Constitution," or "invite[s] the legislature to complete a conversation about remedies by selecting from a range of constitutional options."[74]

The real concern with a court's issuance of an immediate remedy is that this may create a new legal equilibrium that has long-lasting effects simply by virtue of the subsequent *burdens of inertia* in the legislative process, or the expenditure of large-scale funds in the process of implementation, which cannot later be recouped by adoption of a different scheme.[75] One of the arguments for judicial review in the context of otherwise consolidated and well-functioning democracies is that legislative process is often subject to multiple veto points such that it is difficult to get remedial action necessary as it might be, which courts can help overcome by appropriately sensitive exercise of the power of judicial review.[76] In adopting a deferred remedy, courts could thus be seen as attempting to calibrate their intervention—so as to

(last visisted Sept. 12, 2016). *See also* Christina Murray, *Kenya's 2010 Constitution*, 61 NEUE FOLGE BAND JAHRBUCH DES OFFENTLICHEN RECHTS 747 (2013).

74. Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 540, 546 (2005); Kent Roach, *Remedial Consensus and Dialogue under the* Charter*: General Declarations and Delayed Declarations of Invalidity*, 35 U.B.C. L. REV. 211, 219 (2002). For similar arguments in a US context about the benefits of remedial delay in prompting or creating space for a legislative response, see, for example, Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 363–73 (2016); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 180 (2014).

75. Dixon, *supra* note 23, at 402–03.

76. *See* Rosalind Dixon, *The Supreme Court of Canada,* Charter *Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 258–59 (2009); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 967–68 (2008); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 95–101 (2004). *Cf.* William N. Eskridge Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382, 382–83 (1993).

contribute to overcoming, rather than ultimately increasing, the effects of inertia in the legislative process.[77]

Another aim of judicial deferral in certain cases, however, is far more political in nature—i.e. based on an attempt by courts to increase the ultimate *effectiveness* of their intervention in the broader political process, not simply to allow time for the political branches to adjust or respond to their decisions. A delayed judicial response, coupled with some form of "remand" to the legislature, promotes shared responsibility between courts and legislatures for implementing constitutional norms. Cases of this kind frequently involve little real choice for Parliament as to whether or how to implement a particular constitutional requirement. Rather, deferral is aimed at encouraging Parliament to defend the need to comply with the constitution by becoming a co-venturer in the project of constitutional compliance, and not simply leave it to the court to defend constitutional requirements in the face of potential public opposition. Deferral, in this sense, is also most valuable as a tool—and most likely to occur—where there is a particular danger of popular political backlash against the court.

To return to our opening example of the United States' decision in *Obergefell*, the contrast is apparent. In Canada, between 2002 and 2003, provincial courts in three separate provinces contributed to the recognition of same-sex marriage via issuing opinions finding incompatibility between the common law (opposite sex) definition of marriage and the guarantee of equality in Section 15(1) of the *Charter*. All at some stage also issued a suspended declaration of invalidity.[78] By similar measure, the Constitutional Court of South Africa in *Fourie*[79] unanimously held that the existing common law (opposite sex) definition of marriage, and national marriage legislation picking up that definition of marriage, were inconsistent with the constitutional prohibition against "unfair discrimination on the grounds of sexual

77. *Cf.* Roach, *Constitutional, Remedial, and International Dialogues*, *supra* note 74, at 540.

78. Thus, in *Barbeau v. British Columbia* (Attorney General) [2003] B.C.C.A. 251, para. 7 (Can. B.C. C.A.), the British Columbia Court of Appeal ruled that denial of marriage licenses to same-sex couples violated the *Charter* and gave the government fourteen months to change the definition of marriage. In *Hendricks v. Québec (Procureure Générale)*, [2002] R.J.Q. 2506 (Can. Que. Super. Ct.) and *Halpern v. Canada (Attorney General.)*, [2002] 60 O.R. (3d) 321 (Can. Ont. Sup. Ct.), the respective courts issued declarations of invalidity suspended for two years. It was only when the appeal in *Halpern* was heard by the Ontario Court of Appeal that the Court ordered that the declaration of invalidity should be given immediate effect, and a new definition of marriage "read in" to the law, which defined marriage as "the voluntary union for life of two persons to the exclusion of all others." *Halpern v. Canada (Attorney General)*, [2003] 65 O.R. (3d) 161, ¶ 148 (Can. Ont. Sup. Ct.).

79. *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.).

orientation."[80] At the same time, the Court also suspended the effectiveness of its decree for twelve months to allow the National Assembly time to amend national marriage legislation.[81]

On its face, *Fourie* is an odd decision. There was very little doubt about the facial invalidity of the prohibition on same-sex marriage under the South African Constitution. Indeed, the Court held that under the express provisions of the Constitution any discrimination on the grounds of sexual orientation is prohibited, and further that equality for gays and lesbians in this context mean both a practical *and* symbolic equality. Thus, short of abolishing civil marriage in response to the decision, the only real option open to the Assembly in responding to the CCSA's decision was to introduce legislation recognizing same-sex marriage.[82]

Nonetheless, requiring political accountability for normalizing same sex marriage had a strong legitimizing rationale: those members of the African National Congress (ANC) who wrote the equality provisions of the Constitution shared a strong commitment to recognizing rights to equality on the part of LGBT South Africans. But that constitutional commitment ran far ahead of the views of a vast majority of ordinary South Africans. For the CCSA to avoid a popular backlash, it was thus important to encourage Parliament to share responsibility for implementing the constitutional mandate of equality.

Justice Sachs, who wrote the opinion for the Court, in fact came close to acknowledging this explicitly in an extra-judicial context, when he suggested that the feeling of the justices was that "unions between same-sex couples would have greater *entrenchment*" and social "resonance" if enacted pursuant to legislation, not simply a court order.[83] As Theunis Roux suggests, "it was important for the CCSA to enlist the legislature's cooperation in the enforcement of a legal change

80. *Id.* ¶ 4.

81. One Justice, Kate O'Regan J., held in a separate judgment that same-sex marriage should be read into existing legislation, thereby entitling the petitioners to immediate relief. *Id.* ¶¶ 165–71. The rest of the Court reached the constitutional merits and ordered deferral. *See also* Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TULANE L. REV. (forthcoming 2016).

82. On the narrowness of the mandate to Parliament, see, for example, Pierre de Vos, *A Judicial Revolution? The Court-led Achievement of Same-Sex Marriage in South Africa*, 4 UTRECHT L. REV. 162, 164 (2008); Pierre de Vos & Jaco Barnard, *Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga*, 124 S. AFR. L.J. 795, 803 (2007); Graham Gee & Gregoire C. N. Webber, *A Confused Court: Equivocations on Recognising Same-Sex Relationships in South Africa*, 69 MOD. L. REV. 831, 838–41 (2006).

83. Justice Albie Sachs, *The Sacred and the Secular: South Africa's Constitutional Court Rules on Same-Sex Marriages*, 102 KY. L.J. 147, 153 (2013) (emphasis added). *See also* THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 255–56 (2013).

that was likely to be highly divisive," and thus that risked "further weakening public support for the Court."[84] Through deferral, "the court was trying to send a message to Parliament to take greater responsibility for contentious issues of law and 'morality.'"[85]

The response by the National Assembly to the Court's decision also largely bore out this strategy. Initially, the government introduced a Bill that would have introduced a form of "civil union" for same-sex couples, which was distinct from marriage under the *Marriage Act*, and available only to same-sex couples.[86] The LGBT community, however, immediately attacked the proposed legislation, citing the language of the court in *Fourie* requiring symbolic as well as material equality for same-sex couples, and rejecting a doctrine of "separate but equal" for same-sex as opposed to opposite-sex marriage.[87] Ultimately, the government amended the Bill to create a right of access to "marriage" or "civil partnership" for opposite and same-sex couples.[88] In key respects, therefore, judicial deferral in *Fourie* achieved its objective: it achieved a form of "legitimacy on same-sex relationships that would have been unthinkable only ten short years earlier;"[89] and "leveraged the democratic authority and popularity of Parliament generally, and the ANC specifically, [to] bolster[] the Court's judgment," and thus created "more popularly legitimised equality for same-sex couples."[90]

In circumstances of weak or dominant party democracy, second-order—or strategic judicial delay of this kind—can also have two salutary benefits: it can provide crucial additional time for social movements of the political opposition to organize, or for political dynamics to change more organically, in ways that make it more likely that there will be political support for compliance with court decisions. And it can provide a natural window of opportunity for lawyers and legal academics to accept new lines of constitutional reasoning: this may occur because lower court judges, or new appointments to a court,

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84. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CON. L. 106, 122 (2009). *See also* THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 255–56 (2013).

85. Beth Goldblatt, Note, *Same-Sex Marriage in South Africa – The Constitutional Court's Judgment*, 14 FEMINIST LEGAL STUD. 261, 270 (2006).

86. The Bill also created broad rights on the part of state officials not to solemnize such unions. *See* de Vos, *A Judicial Revolution?*, *supra* note 82, at 167.

87. *See, e.g.*, *id.*; David Bilchitz & Melanie Judge, *For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa*, 23 S. AFR. J. HUM. RTS. 466, 477–78 (2008).

88. de Vos, *A Judicial Revolution?*, *supra* note 82, at 169–70.

89. *Id.* at 174.

90. Eric Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, 13 J. GENDER RACE & JUST. 575, 610 (2010).

also endorsed similar lines of reasoning, thereby giving them an additional appearance of approval or legitimacy. Or it may be because scholars come to be persuaded of the merits of a particular line of reasoning, and/or decide to teach that reasoning to their students, as an accepted (even if controversial) part of the constitutional canon. All of these acts may contribute to the increasing perception of new lines of judicial reasoning as "legitimate," but all also require some real time to occur.

Second-order judicial delay, in this sense, is a close ally of the kind of judicial temporizing strategies advocated by Alexander Bickel. Bickel, in *The Least Dangerous Branch*, famously argued that courts should use a variety of techniques—or "passive virtues"—to avoid a direct collision with the political branches.[91] Techniques of this kind include doctrines of standing, ripeness and mootness, as well as the political question doctrine, and doctrines of constitutional avoidance.[92] The difference between many of these techniques and deferral, however, is that they do not spell out the likelihood that courts will impose binding constraints on political actors *in the future*. For some of these techniques, such as ripeness, this is more or less implicit in the nature of the doctrine. But for many others, it is far less clear that courts can or will impose such constraints in later cases. For deferral, however, this is a more or less explicit feature of the court's approach: deferral, by definition, involves the taking of some specified action at a later date. This means that unlike many other *Bickelian* techniques, deferral necessarily involves a court deciding certain aspects of a concrete legal dispute, but then also delaying the legal or political effect of the remedy it provides in connection with that reasoning.

C. Connecting Modes and Functions

Deferral is thus ultimately a judicial practice that has at least two different broad modes *and* functions. Deferral by courts may be more or less explicit or implicit—i.e. first-order or second-order in mode or

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91. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); Javier A. Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002*, 10:4 DEMOCRATIZATION 70, 87 (2003) ("[C]ourts have managed to acquire high levels of institutional autonomy by deliberately avoiding challenges to the 'political branches' of government, even at the cost of retreating from their constitutional powers of review of administrative and legislative acts."); Delaney, *supra* note 16.

92. Couso, *supra* note 91. In *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring), Justice Brandeis articulated a set of principles for constitutional avoidance. For a useful recent discussion, in a comparative context, see generally, Erin Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543 (describing how the U.K. Supreme Court has laid the groundwork for its judicial supremacy).

approach. But deferral may also have two broad functions: one of which is focused on ensuring the practicality or principled quality of judicial review, under conditions of a need for legal continuity, or strong democratic disagreement; and another of which is focused on a more strategic set of concerns for courts, or the effectiveness of judicial review against a backdrop of fragile democracy, or more specific threats to judicial power.

Table 1 – Modes & Functions of Judicial Deferral

	Mode	Function
First-order	Explicit (suspended declarations, progressive realization, prospective overruling)	Practical, Principled
Second-order	Implicit (*Marbury*-style ratio/dictum)	Strategic

The two different modes and functions of deferral also interact in complex ways: in principle, both the first-order and second-order goals of deferral may be achieved via the use of *either* first- *or* second-order means. But there also may be ways in which, in some cases, either first-order modes of deferral are more suited to first-order goals, or second-order approaches are more likely to achieve second-order aims.

Consider the timeframe for deferral as one of potential factor that may affect its success: if the aim of deferral is first-order in nature, it will often be important for judges to specify a clear and realistic timeframe for a legislative response. Otherwise, the danger may be that the legislature will simply ignore the decision indefinitely, or delay its response for such a long period that constitutional litigation does nothing to overcome existing problems of legislative inertia.[93]

If the aim of deferral is second-order in nature, in contrast, there will often be strong arguments for a judge to *avoid* stipulating a clear timeframe for future (stronger) judicial intervention. Often a timeframe of this kind will provide insufficient flexibility to adapt to evolving legal and political conditions. And a court that promises to intervene at a later date, but then declines to do so, will quickly lose credibility as an institution capable of engaging in effective deferral: deferral depends on the threat (or promise) of future action, and if that threat loses credibility, deferral will become largely indistinguishable from wholescale forms of judicial deference. This, in many cases, will mean that second-order approaches to deferral are best achieved through

93. *See supra* note 76 (collecting sources).

second-order modes or tools, of the *Marbury*-kind, which allow maximum scope for ambiguity around the timeframe for future strengthening in judicial review.

III. *MARBURY* & SECOND-ORDER DEFERRAL IN COMPARATIVE PRACTICE

For democracies forged in the post-1989 cauldron, no courts loom more influential than the German Constitutional Court and the Indian Supreme Court. Each was an important actor in the consolidation of democratic governance, one in the post-Hitler period, the second in the uncertain era of dominant Congress Party rule after Independence and Separation. On the doctrinal plane, these two courts provided the critical jurisprudence of proportionality review and the basic structures doctrine. As important as those developments may have been jurisprudentially, they also reveal judicial caution in engaging the process of overseeing political power, a process that has become apparent even in Colombia or Indonesia, where courts have played an equally central role in in the transition to democracy.[94]

In each case, courts have created a wide-ranging jurisprudence with the capacity to protect democracy from threats from within, yet have enjoyed a remarkable degree of success in enforcing their decisions. The path these courts have taken in reaching this result thus offers potentially important lessons for other courts seeking to embark on the task of protecting a new or otherwise fragile democracy.[95] A consistent feature of these courts' decisions, over time, is also the degree to which they have relied on a variety of forms of judicial deferral.

A. German Proportionality

Germany's current constitutional law—Basic Law (*Grundgesetz*)—dates back to the promulgation of the Bonn Constitution in 1949. The 1949 Basic Law "established the Federal Constitutional Court, a

94. *See, e.g.*, Susan Alberts et al., *Democratization and Countermajoritarian Institutions: The Role of Power and Constitutional Design in Self-enforcing Democracy*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 69, 87 (Tom Ginsburg ed., 2014) (discussing Colombia); Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, *in* FRAMING THE STATE IN TIMES OF TRANSITION 350, 350 (Laurel E. Miller ed., 2010) (discussing Hungary); SOLOMON A. DERSSO, TAKING ETHNO-CULTURAL DIVERSITY SERIOUSLY IN CONSTITUTIONAL DESIGN: A THEORY OF MINORITY RIGHTS FOR ADDRESSING AFRICA'S MULTI-ETHNIC CHALLENGE 236–37 (2012) (discussing South Africa).

95. *Cf.* Ran Hirschl, *The Question of Case Selection in Comparative Law*, 53 AM. J. COMP. L. 125, 144–46 (2005) (reviewing the most difficult cases principle).

tribunal whose principal function was the adjudication of constitutional questions."[96] For as powerful as the current German Court has become, that was not always the case. The characteristic German doctrine of proportionality review of the relation between the ends and means of challenged legislation emerged slowly in the postwar period. Proportionality review forces a judicial assessment of the importance of the governmental objective and the suitability of the regulatory mechanism selected. Doctrinally, proportionality review necessitates a judicial examination of the functioning of the political branches.[97] As Niels Petersen explains, the German Constitutional Court, though now known for its proportionality review, "was reluctant to use balancing considerations in the first two and a half decades of its existence when it overturned a law,"[98] lest it appear political and "undermine its legitimacy."[99] With the pivotal *Lüth* decision of 1958, however, the Court found an ideal vehicle for introducing its "balancing framework and develop[ing] it without undermining its own legitimacy."[100]

Critically, in *Lüth,* the Court could develop constitutional doctrine in a context in which there was no confrontation with state authority. The dispute concerned the first postwar film of director Veit Harlan,[101] a notorious Nazi propagandist who served as the screenwriter of *Jud Süss*, "the most notorious anti-Semitic propaganda feature of the Third Reich."[102] Though Harlan had officially been acquitted of war crimes,[103] Erich Lüth, the director of the Hamburg press office, called for a boycott for "fear that Harlan's re-emergence would lead world opinion to believe that Germany had not rejected the national-socialist past."[104] A state court found Lüth liable for intentionally injuring

96. Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 248–49 (1989) [hereinafter Quint, *Free Speech*].

97. Most recently, the Australian High Court in *McCloy v. NSW* [2015] HCA 34 adopted proportionality review to permit the government of New South Wales to impose campaign finance restrictions. The opinion was in many ways a more assertive review of the legitimacy of governmental purposes against abstract constitutional principles than is the norm in Australia. Yet, the articulation of proportionality review was in order to uphold challenged governmental action.

98. Niels Petersen, *Balancing and Judicial Self-Empowerment: A Case Study on the Rise of Balancing in the Jurisprudence of the German Federal Constitutional Court*, 4 GLOBAL CONSTITUTIONALISM 49, 67 (2015).

99. *Id.* at 56.

100. *Id.* at 72.

101. Peter E. Quint, *A Return to Lüth*, 16 ROGER WILLIAMS U. L. REV. 73, 75 (2011) [hereinafter Quint, *Return*].

102. Valerie Weinstein, *Dissolving Boundaries: Assimilation and Allosemitism in E.A. Dupont's* Das alte Gesetz *(1923) and Veit Harlan's* Jud Süss *(1940)*, 78 GERMAN Q. 496, 497 (2005).

103. Boris Burghardt, *Harlan (Jud Süss Case)*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 720, 721 (Antonio Cassese et al. eds., 2009).

104. Quint, *Free Speech*, *supra* note 96, at 285.

Harlan "in a manner contrary to public policy,"[105] and enjoined all further efforts to organize a boycott.[106]

Proportionality review emerged from Lüth's challenge that the injunction was a violation of his Article 5 freedom of expression.[107] This itself was a jurisprudential stretch because the underlying dispute was between two individual citizens and not a state attempt to censor speech as such. The Court adopted a "creative" solution[108] to this jurisdictional problem: it held that the Basic Law "erects an objective system of values in its section on basic rights,"[109] thus protecting freedom of expression not only from state but also private threat.[110] Once in the domain of constitutional law, the Court invoked Justice Cardozo's assertion that freedom of expression is "the matrix, the indispensable condition of nearly every other form of freedom,"[111] and found the injunction against speech to be "contrary to public policy."[112] Lüth's attempt to protect the reputation of German culture from ties with Nazism not only posed no threat to public law, but also reflected a core animating definition of post-Nazi Germany.[113] Instead, the basic commitments to freedom of expression and German reputation outweighed the filmmakers' private economic interests, and the Constitutional Court reversed the state court's injunction.[114]

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105. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, § 826 (Ger.), *translation at* https://perma.cc/63VH-W327.

106. Quint, *Free Speech*, *supra* note 96, at 253–54.

107. GRUNDGESETZ [GG] [BASIC LAW], Art. V (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf [https://perma.cc/3Z6B-M4SQ].

108. Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 815 (1997).

109. Bundesverfassungsgericht [BVerfGE] [German Constitutional Court], Jan. 15, 1958, 1 BvR 400/51 (Ger.), *translation at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369.* [https://perma.cc/LW67-YWAU].

110. Quint, *Free Speech*, *supra* note 96, at 262 ("If the goal of the 'objective' value is to encourage the optimal amount of speech for the good of society, that value can be significantly impaired by repression of speech whether the repression comes from the state or from private individuals or groups.").

111. 1 BVerfGE 400/51 (Ger.) (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (quoting Cardozo, J.), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)).

112. *See* Quint, *Free Speech*, *supra* note 96, at 284–86 (discussing the role of section 826 in the Court's balance between public and private interest); Bürgerliches Gesetzbuch [BGB] [Civil Code], Jan. 2, 2002, § 826 (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf [https://perma.cc/63VH-W327].

113. *See* Quint, *Free Speech*, *supra* note 96, at 285.

114. 1 BVerfGE 400/51 (Ger.). *See also* Petersen, *supra* note 98, at 69; Quint, *Free Speech*, *supra* note 96, at 286 (both describing the Court's balancing and its decision in Lüth's favor).

For our purposes, the German Court expanded the domain of constitutional scrutiny in Germany but avoided a frontal challenge to the political branches. *Lüth* "represented a new concept of primacy of constitutional law,"[115] "the locus classicus of the German doctrine that the Constitution 'influences' German private law,"[116] and "the foundation of . . . the 'Postwar Paradigm' of constitutional rights adjudication."[117] Yet, as Petersen has noted, the Court managed to expand its power of review without any threat to the legislature or executive: the Court selected "a case that catered to the suspicion against the general judiciary. *Lüth* was thus ideal for claiming the review authority and to introduce balancing as a doctrinal tool."[118]

B. Indian Basic Structures

Conflict between the Indian Constitutional Court and the political branches began almost as soon as the Constitution was ratified in 1950.[119] Early Court decisions thwarting land redistribution resulted in Parliament fashioning a "unique constitutional device of designating a portion of the constitution to be immune from judicial review, what was termed the "Ninth Schedule," and placing controversial enactments within that Schedule."[120] Occasionally, the Court would reassert itself, as with the declaration in *Golak Nath* in 1967 that all legislative initiatives, regardless of whether framed as statutes of constitutional amendment, would be subject to Court scrutiny for possible violation of fundamental rights.[121] The decision came against the backdrop of severe

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115. Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective*, 23 TUL. EUR. &. CIV. L. F. 1, 2 (2008).

116. Quint, *Return*, *supra* note 101, at 74 (quoting Jacco Bomhoff, Lüth's *50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing*, 9 GERMAN L.J. 121, 121 (2008)).

117. Bomhoff, *supra* note 116, at 122 (quoting Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

118. Petersen, *supra* note 98, at 72. Of course, the Court did directly challenge prior legal understandings of judicial review, and thus an important question the case raises is as to how the court managed to diffuse potential legal opposition to this shift. On this point, see, for example, Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism*, 12 INT'L J. CONST. L. 626, 637–38 (2014).

119. *See, e.g.*, Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476 (2003); C. C. Aikman, *The Debate on the Amendment of the Indian Constitution*, 9 VICTORIA U. WELLINGTON L. REV. 357, 359 (1978); Ved P. Nanda, *The Constitutional Framework and the Current Political Crisis in India*, 2 HASTINGS CONST. L.Q. 859, 859–61 (1975). *See also* ISSACHAROFF, *supra* note 20, at 159–60.

120. ISSACHAROFF, *supra* note 20, at 160.

121. *Golak Nath v. Punjab*, AIR 1967 SC 1643, 1644 (India).

tensions between the Court and the Congress Party over policies of land reform, the primary area of judicial intervention in the early years of Indian independence. As power consolidated in the Congress Party, the Court responded in 1973, with *Kesavananda Bharati v. Kerala*,[122] decreeing the "basic structure" of the constitution to be immune from legislative amendment.[123]

Yet *Kesavananda* set out the doctrine of immutable constitutional commitments gingerly. Seven justices held that the doctrine of unconstitutional constitutional amendments applied only so as to protect "the basic structure" of the existing Constitution, or to prevent amendments to the Constitution that threaten to impair the Constitution's basic structure. But almost all explicitly endorsed the central importance of democratic institutional arrangements without venturing to specify the reach of the new doctrine.[124] Again, the decision also came against the backdrop of mounting tension between the Court and the Congress Party-controlled Parliament: Congress regained a strong majority in Parliament in the 1971 general elections, and used that majority to enact a wide range of constitutional amendments designed to challenge the property rulings of the Court.[125]

The relation between the property cases and the basic structures doctrine lay unresolved until the Court decided *Minerva Mills Ltd. v. India*[126] in 1981,[127] a case that tested whether a constitutional protection of property could thwart central economic planning under the Sick

122. (1973) 4 SCC 225 (India).

123. *Id.* ¶ 1163.

124. Chief Justice Sikri, Justice Shelat and Justice Grover held that the concept of the "basic structure" included a "republican and democratic form of government" and the separation of powers. *Id.* ¶¶ 302–04, 599. Justices Hedge and Mukherjea held that it included the "democratic character of our polity" and "the essential features of the individual freedom secured to citizens" *Id.* ¶ 682. Justice Reddy emphasized India's status as a "Sovereign Democratic Republic" and "parliamentary democracy" with three organs of the state. *Id.* ¶¶ 968, 1171. Only Justice Khanna was less clear in setting out the relationship between democracy and the basic structure doctrine. *See* David Gwynn Morgan, *The Indian "Essential Features" Case*, 30 IN'T & COMP. L. Q. 307, 320–21 (1981); S.P. Sathe, *Judicial Review in India: Limits and Policy*, 35 OHIO ST. L.J. 870, 890 (1974); VENKATHESH NAYAK, THE BASIC STRUCTURE OF THE INDIAN CONSTITUTION 5–6 (unpublished manuscript), (last visited Sept. 2, 2016, 1:54 PM), http://www.constitutionnet.org/files/the_basic_structure_of_the_indian_constitution.pdf [https://perma.cc/4KUR-RSCR].

125. *See* GRANVILLE AUSTIN, WORKING DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 500–15 (2000). *See also* Neuborne, *supra* note 119, at 489–90.

126. (1981) 1 SCR 206.

127. *See* ISSACHAROFF, *supra* note 20, at 162–63. For an in-depth account for the Court's "basic structure doctrine" jurisprudence from the self-proclaimed "standpoint that the 'basic structure' doctrine is anti-democratic and counter-majoritarian in nature," see Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 108 (B.N. Kirpal et al. eds., 2000).

Textiles Nationalization Act of 1974. In addition to the statutory authority to seize underperforming economic enterprises, Parliament in 1978 passed the Forty-Fourth Amendment,[128] which removed constitutional protection from nationalizations of this sort by demoting the right to property from its status as a fundamental right,[129] and "immunizing [it] from judicial review."[130]

Pursuant to the Act, the textiles mills in Karanata were deemed to have been "managed in a manner highly detrimental to the public interest,"[131] and were in turn taken over by the National Textiles Corporation.[132] The owners of Minerva Mills challenged the Textiles Act, which would in turn force a confrontation not only with the statutory power to expropriate, but with the ability to place contested social legislation outside the reach of judicial review. The Court's decision found the balance that could restore judicial authority after the period of Emergency Rule, but not force a direct confrontation. The Court held both that the power to place legislation on the Ninth Schedule outside judicial review violated the basic structures of the Constitution, even if it took the form of a constitutional amendment, *and* that the right to property was not a fundamental right that could not be altered statutorily.[133] In other words, the Supreme Court won, the government lost, but the owners of Minerva Mills got nothing in the process.[134]

Instead, in the lasting form of Justice Bhagwati's *Marbury*-like concurrence,[135] "both a limited amending power, as well as the power of judicial review of government actions, were part of the basic structure of the Constitution."[136] The result was an "assertion of judicial supremacy without contest,"[137] helped along by the defeat of the

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128. *Minerva*, 1 SCR at 206.

129. INDIA CONST., *amended by* The Constitution Act (Forty-Fourth Amendment), (1978); *see also* AUSTIN, *supra* note 125, at 506.

130. Mate, *Two Paths*, *supra* note 29, at 186–87.

131. *Id.* at 186 (citing Ramachandran, *supra* note 127, at 118).

132. *Id.*

133. Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441, 468–69, 476–77 (2013) [hereinafter Mate, *State Constitutions*] (citing Minerva Mills, (1981) 1 S.C.R. 206, 240). Mate also notes that the Court affirmed the basic structure doctrine in *Minerva Mills*' companion case, *Waman Rao v. Union of India*, (1981) 2 SCR 1: Mate, *State Constitutions*, at 478. *See also* Gary Jeffrey Jacobson, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 476 (2006) (discussing the Court's affirmation of the basic structure doctrine by upholding limited amendment power).

134. AUSTIN, *supra* note 125, at 507 n.11.

135. Maureen Callahan Vandermay, *The Role of the Judiciary in India's Constitutional Democracy*, 20 HASTINGS INT'L & COMP. L. REV. 103, 118 (1996).

136. Mate, *Two Paths*, *supra* note 29, at 187.

137. Ramachandran, *supra* note 127, at 120.

Congress Party in the 1977 elections. Rather than an act of usurpation, the opinion gathered "strong approval" from elites and the media for whom the judiciary was now a strong limiting partner against governmental excess.[138]

In other cases such as *Indira Gandhi (The Election Case*),[139] the Court altered the form of deferral but nonetheless consolidated an even more successful attempt to impose constitutional limitations on Prime Minister Gandhi. At issue were a series of constitutional amendments designed to insulate the Prime Minister from legal accountability. A state court had found that Gandhi violated several electoral laws in her election to office in 1971 and that the election was to be overturned and Gandhi banned from holding elected office for six years. The direct effect was to disqualify Gandhi from sitting in parliament and serving as Prime Minister. The Congress Party-dominated Parliament responded by swiftly moving to protect Gandhi by the passage of three constitutional amendments, which among other things prevented judicial review of the validity of the election of the Prime Minister and speaker of the lower house.[140]

When presented to the Supreme Court in 1975 in the *Election Case,* a majority strongly affirmed the basic structure doctrine, and held that the doctrine prevented Parliament from seeking to immunize Gandhi from criminal liability via a constitutional amendment. In *Marbury* fashion, however, the ruling in the *Election Case* avoided any direct confrontation with the triumphant party. The Court held both that it was unconstitutional to seek to immunize the Prime Minister *and* that the actions of Gandhi and her supporters did not violate the electoral code.[141]

The immediate effect of the Court's decision, therefore, was to allow Gandhi to retain her seat in Parliament, and to contest future democratic elections. For the short-term at least, this also effectively diffused pressure from the Prime Minister and her supporters further to curtail the jurisdiction of the court itself. Parliament did respond to the decision by passing wide-ranging limits on the jurisdiction of the Court designed to override various aspects of the Court's reasoning in *Kesavananda*: among other things, the 42nd Amendment purported to exclude judicial review over all constitutional amendments, to reassert the notion that amendments constituted an exercise of constituent

138. Manoj Mate, *Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India*, 28 TEMP. INT'L & COMP. L.J. 361, 375 (2014).

139. *Utter Pradesh v. Raj Narain*, AIR 1975 SC 865, 867 (India).

140. *See, e.g.*, Neuborne, *supra* note 119, at 493.

141. *Id. See also* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 619 (2015).

power, to require a super majority of votes on the Court to invalidate legislation, and to add to the list of directive principles that could trump fundamental rights.[142] But at the time the *Election Case* was handed down, even more proposals were being debated among members of the Congress Party, which involved entirely abolishing the Court and replacing it with a French style *conseil constitutionel*, with no concrete powers of judicial review, and (mostly) politicians rather than lawyers as members.[143]

In the medium-term, the Court's intervention in the *Election Case* also arguably served as an important source of protection for the integrity of democratic elections. As one of us has noted elsewhere with David Landau, a clear message from the decision was a warning to Gandhi about the consequences of any future electoral misconduct: Parliament could not effectively protect her from either civil or criminal liability for such misconduct.[144] In the subsequent 1977 election, Gandhi also seemed to compete according to ordinary notions of electoral competition, or at least did not flagrantly attempt to manipulate the results of the election in her own favor.[145] Indeed, the results of the election were a notable success for democratic hedging: for the first time in Indian political history, a party other than the Congress Party (the Janata Party) won a majority of seats in the national Parliament, and formed government.[146]

Another way of reading the Indian experience in this period is also one of more general reliance on second-order deferral in cases involving the unconstitutional constitutional amendment doctrine, as a means of building increased support, or acceptance, of such a doctrine among the Indian legal and political establishments. The Court issued

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142. INDIA CONST., *amended by* The Constitution Act (Forty-Second Amendment), (1976). *See, e.g.*, Neuborne, *supra* note 119, at 494.

143. *See* R. Sudarshan, *In Quest of State: Politics and Judiciary in India*, 28 J. COMMONWEALTH & COMP. POL. 44, 54 (1990).

144. Dixon & Landau, *supra* note 141, at 620.

145. *Id*. To some extent, this may have been a product by Ghandi's expectation of electoral success. But in other contexts, Ghandi was not averse to using extraordinary means to ensure her own continuity in office perspective.

146. *See* AUSTIN, *supra* note 125, at 393–95 (describing the election and its results). Of course the main factor driving this result was voter dissatisfaction with Prime Minister Gandhi and the Congress Party, but the Court helped ensure a free and at least relatively fair vote reflecting that dissatisfaction. *See, e.g.*, Neuborne, *supra* note 119, at 494; Amal Ray, *From a Constitutional to An Authoritarian System of Government: Interactions Between Politics and the Constitution in India,* 25 J. COMMONWEALTH & COMP. POL. 275, 288–89 (1987).

rulings that had only prospective effects,[147] or applied only to future constitutional amendments.[148]

Perhaps equally significant, the basic structure doctrine became entrenched in India jurisprudence. When the doctrine was first announced in *Kesavananda*, Indian scholars suggest, "few jurists supported it, as there was little in Anglo-American constitutional theory from which they drew intellectual nourishment that sustain the doctrine."[149] By the 1980s, however, the doctrine had grown to be a "well recognised and established doctrine," which enjoyed "widespread support from intellectuals, lawyers and even politicians" in India.[150] In part this was because it had been reaffirmed by a greater number of justices, in different cases.[151] And it was also because it had come to enjoy broader support among Indian constitutional scholars.

Thus, by the time of the confrontation with Gandhi in the *Election Case*, the Court could look back upon a well-known line of prior reasoning to claim that democracy,[152] the "democratic" and republican status of the Constitution,[153] the separation of powers,[154] and the provision for judicial review,[155] were part of the basic structure of the Constitution.[156] After the period of Emergency Rule, the cumulative weight of these decisions checked some of the more egregious electoral manipulations of the Congress Party.[157]

C. The Colombian Confrontation.

Examined in this light, the Colombian Court's confrontation with Uribe reveals a more nuanced history than simply a showdown at the

147. *See Golak Nath v. Punjab*, AIR 1967 SC 1643 (India).

148. Sathe, *supra* note 124, at 877–78; Aman Ullah & Samee Uzair, *Basic Structure of Constitution: Impact of* Kesavananda Bharati *on Constitutional Status of Fundamental Rights*, 26 S. ASIAN STUD. 299, 305 (2011).

149. Sudarshan, *supra* note 143, at 57.

150. *Id.*; Ullah & Uzair, *supra* note 148, at 306.

151. Sudarshan, *supra* note 143, at 57; Ullah & Uzair, *supra* note 148, at 306.

152. *Kesavananda Bharati v. Kerala*, AIR 1973 SC 703–04 (India) (Khanna, J.).

153. *Id.* at 991–92 (Chandrachud, J.).

154. *Id.* at 165–66 (Sikri, C.J.).

155. *Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865 (India) (Thomas, J.) (as discussed in Nayak, *supra* note 124, at 7).

156. *See, e.g.*, Nayak, *supra* note 124, at 5–6.

157. Of course, it should also be noted that in subsequent cases the doctrine was applied to quite different ends, or with quite different consequences. *See, e.g.*, Writ Petition (C) No. 83 of 2015 at 219, *Supreme Court Advocates-on-Record v. Union of India*, (2015) (India) (invalidating the National Judicial Appointments Commission). This is also an inherent danger in the development of such doctrine. *See, e.g.,* Dixon & Landau, *supra* note 141, at 606.

O.K. Corral. When Uribe was first elected President in 2002, his commitment to "democratic security" realized the first inroads against the paramilitary forces associated with either narco-traffickers or left-wing guerrilla groups such as the Revolutionary Armed Forces of Colombia (FARC). The result was a substantial decline in the rate of murder and kidnapping across the country, and Uribe's popularity soared.[158] With order and prosperity being restored, there was little surprise in the fact that Uribe enjoyed tremendous popular support. His supporters in Congress capitalized and pushed through a constitutional amendment permitting a second term in office.[159]

The constitutionality of the amendment landed in the hands of the Constitutional Court. In a fashion reminiscent of repeated assertions of judicial competence to entertain fraught political questions, the Court took up not only the procedural issues of the forms of constitutional amendment but the substance of the amendment as well. According to a majority of the Court, constitutional amendments were limited to the power of amending the Constitution, not replacing one constitutional regime with another.[160] Thus, Congress could amend the Constitution, but only the Colombian people could replace the constitutional order. The unmistakable implication in drawing this distinction was a role for the Court in determining whether a particular constitutional amendment in fact constituted an amendment properly so called, or rather a substitution of the Constitution. The Court laid out a three stage approach to answering this question: first, the identification of whether a particular feature of the Constitution was "an essential or defining" feature; second, whether a particular amendment in fact sought to alter that feature; and third, whether the alteration in question was "contrary to" or "wholly different" from relevant prior constitutional provisions.[161]

On the central issue of whether President Uribe could run for a second term, however, the Court coupled its assertion of a broad judicial role with political non-confrontation. In assessing the proposed changes to the term limits for the Presidency, at the second stage of analysis, the court ultimately found that an eight-year term limit for the Presidency did not alter the defining aspects of the Constitution, which establish a "social and democratic state."[162] Rather, it held that such a

158. *See* Posada-Carbó, *supra* note 31, at 138.

159. *Id*.

160. Corte Constitucional [C.C.] [Constitutional Court], octubre 19, 2005, Sentencia C-1040/05 (Colom.). The Court makes an authoritative English summary available at http://english.corteconstitucional.gov.co/sentences/C-1040-2005.pdf [https://perma.cc/T3RX-C9KA].

161. Manuel José Cepeda Espinosa & David Landau, *Colombian Constitutional Law* (unpublished manuscript) (on file with authors).

162. *See* Corte Constitucional, *supra* note 160, ¶ 7.2.

change simply "modified" one element of its prior operation, or amended its specific mode of operation, in a manner consistent with Congress' power of amendment. Uribe was therefore free to run, and indeed was the first re-elected Colombian president in 2006.[163]

Uribe remained extremely popular throughout his second term, and in 2008, his supporters once again sought to amend the Constitution to allow him to run for a *third* term in office, only this time by the alternative constitutional mechanism of a national referendum.[164] In 2010, the Court was also once again called on to rule on the validity of this proposed referendum. This time, the Court in its famous direct confrontation with Uribe held that the proposed constitutional amendment *did* constitute a substitution of the Constitution, and was beyond the scope of the power of constitutional amendment under Articles 375 and 378.[165]

In doing so, it also emphasized the quite different consequences for the system of checks and balances created by the Constitution of allowing a single person to remain in office as President for twelve, as opposed to eight years: after twelve years, the President would be in a position to name members of the central bank, the attorney general, the ombudsman, the chief prosecutor, and many members of the Constitutional Court itself, in a way that was not the case given an eight-year term limit.

An important shift occurred between the *First* and *Second Re-Election Cases*. Not only had the Court laid its jurisprudential marker by establishing the justiciability of the substance of constitutional amendment, but the political climate had shifted. While Uribe's personal popularity never fell below sixty-five percent during his time in office, by 2009 Colombia had seen a marked decrease in its rate of economic growth, and thus the strength of the underlying factors sustaining Uribe's popularity.[166] In 2005, Uribe supporters had also created a new Social Party of National Unity (or 'Party of the U'), as a formal political coalition bringing together parties supporting Uribe in parliament. The maturing of the political institutions meant that the choice was not Uribe or the prior chaos. By 2010, two-thirds of

163. Cepeda & Landau, *supra* note 161; Posada-Carbó, *supra* note 31, at 138.

164. The procedure requires a majority of Congress to call a referendum, and a majority of voters at the referendum to support the proposed amendment (providing at least 25 per cent of eligible voters participate). CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 376, 377.

165. In this particular respect, one could argue that the Court's Second Re-Election decision was not in fact fully foreshadowed by the first decision, but instead represented a significant extension of it—as contemplating the constraint of processes akin to the exercise of constituent power, not just delegated processes of constitutional amendment.

166. *Cf.* Posada-Carbo, *supra* note 31, at 138.

Colombian voters identified themselves as affiliated with a political party (by comparison, the 2004 figure was only twenty-six percent), which meant that there was a political framework for democratic life after Uribe. Indeed, once Uribe acceded to the Court's disqualification of the second re-election amendment, he could be replaced by another leader from within his own party.[167] Relative to 2006, the political conditions in 2010 were thus ultimately substantially more favorable to an attempt by the Court to assert limits on a highly popular President, seeking to extend his term in office.

D. *Establishing Independent Judicial Review: Indonesia.*

Judicial delay has been a notable hallmark of many decisions of the Indonesian Constitutional Court. Some of this delay has been first-order in nature, or directed toward avoiding practical inconvenience in the implementation of court decisions. But other instances of deferral have been clearly aimed at increasing the background degree of political support for the court decisions.

Prior to the creation of the Constitutional Court in 2002, there was very limited history of judicial independence in Indonesia, or any independent form of judicial review.[168] When the Court was first created, there was also limited political support for its role: the Court was not given the building, budget or resources necessary to function. A key part of the early jurisprudence of the Court was thus aimed at building a minimum level of public support for its role. To do this, the Court frequently employed a variety of tools, including direct engagement with the media and the government, which would generally be considered unavailable in a more consolidated democracy.[169] It also clearly employed judicial deferral as a means of diffusing opposition to specific court rulings.

In the *Bali Bombing Case*,[170] for instance, the Court's decision met with immediate public controversy.[171] The Court declared the law under

167. Uribe's personal willingness to comply with the Court's decision in this context is also worthy of note, and may itself by an important factor explaining the 'success' of the court's defense of democracy in this context. *Cf.* David Landau & Rosalind Dixon, *Constitution-Making and Constitutional Design: Constitution-Making and Breaking: Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859 (2015) (noting the important personal role of Mandela in South Africa in helping ensure the effectiveness of judicial review in the transition from apartheid).

168. *See, e.g.*, BUTT, *supra* note 66, at 20 (describing "judicial subjugation" in the second half of the twentieth century, under which there was no "judicial independence, let alone judicial review").

169. *See* Prof. Dr. Jimly Asshiddiqie, Address at the Melbourne Law School: Creating a Constitutional Court for a New Democracy (Mar. 11, 2009).

170. For an English translation of the case, see Butt & Hansell, *supra* note 68.

which bombers had been prosecuted unconstitutionally retrospective, but the Chief Justice soon announced in a press conference that the "Court's decision itself could not operate retrospectively."[172] It seems quite likely, therefore, that the Court's decision to defer the effect of its ruling was in part politically motivated, or designed to defuse opposition to the Court's ruling. The unusual—extrajudicial—way in which the Court announced that its decision should be understood to have purely prospective effect, and the fact that the Minister of Justice gave a parallel press conference to the same effect,[173] also adds weight to this conclusion.

Similarly, in the *Electricity Law Case* of 2003,[174] the Court invalidated legislation authorizing the privatization of electricity production, on the basis that this violated the requirement in Article 33 of the Constitution that the "[b]ranches of production that are important to the state, and that affect the public's necessities of life, are to be controlled by the state."[175] On the merits, the Court held that the words "control" required government ownership, not simply regulation, as the government had argued, and ordered that the relevant privatization legislation should be struck down, and the prior legislative regime reinstated "to avoid a legal vacuum."[176] But in doing so, the Court held—this time in the text of its opinion—that the decision should be understood to have only "prospective" rather than retrospective effect, so that all agreements or contracts and permits signed an issue under the law should remain valid until they expired.[177] In part this was due to practical concerns about potential disruption to the supply of electricity, if the Court adopted a position with more immediate legal effect. But in part, it may also have been driven by a concern to diffuse potential political opposition to the decision: the decision went directly against a marked shift toward a more pro-market approach to natural resource management on the part of the Indonesian government, as well as the

171. *Id.* at 180 ("Most understandably, the victims of the bombings and their families, both Indonesian and Australian, saw this decision as a travesty of justice").

172. *Id.* at 181.

173. *Id.*

174. Constitutional Court Decision 001-021-022/PUU-I/2003 (Indonesia) (as translated in Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008 (2008) (unpublished Ph.D. thesis, University of Washington) (on file with the authors).

175. Undang-Undang Dasar Republik Indonesia 1945 [UDD '45] [Constitution] art. 33 (as translated in Simon Butt & Tim Lindsey, The Constitution of Indonesia: A Contextual Analysis 251 (2012)).

176. Cepeda & Landau, *supra* note 161.

177. *Id.*

preferred policies of a large number of international actors, including the International Monetary Fund (IMF).[178]

In 2013, after nearly a decade of increasing public support for its role,[179] the Court suffered a major setback: the Chief Justice of the Court was arrested for corruption, and subsequently convicted and sentenced to life in prison.[180] The public response was also a clear loss in confidence in the Court: President Yudhoyono expressed this sentiment when he suggested that he shared "the anger and the shock of the Indonesian people" about the events, and concern about its impact on the role of the court as "an important institution with [a] major rol[e in] . . . the life of nation and state . . . ."[181] Some media commentators suggested that the bribery scandal had "tainted, if not obliterated, [the] credibility of the Court."[182]

And in 2014, in the *Simultaneous Elections Case*,[183] the Court upheld a challenge to 2008 electoral legislation, which created a system whereby parliamentary elections were held first, and presidential elections three months later, but held that the decision would only take effect at the next round of national elections in 2019, and not at the upcoming 2014 elections. One of the dangers for the Court, in seeking to open up presidential elections in Indonesia in 2014, therefore, was that it came quite soon after a major crisis in public support for confidence in the Court.[184] If there had been a showdown with the People's Representative Council (Dewan Perwakilan Rakyat, or DPR),

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178. Simon Butt & Timothy Lindsey, *Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution*, 44 Bull. Indonesian Econ. Stud. 239, 242 (2009).

179. Juan Carlos Rodríguez-Raga, *Strategic Deference in the Colombian Constitutional Court, 1992–2006, in* Courts in Latin America 81 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

180. Peter Alford, *Jakarta Rocked by Justice Chief Akil Mochtar's Arrest for Bribery*, Australian (Oct. 4, 2013, 12:00 AM) http://www.theaustralian.com.au/news/world/jakarta-rocked-by-justice-chief-akil-mochtars-arrest-for-bribery/story-e6frg6so-1226732545588 [https://perma.cc/M3DE-BTGT].

181. *Id.*

182. Dwi Atmanta, *View Point: When "Reformasi" Devours Its Children*, Jakarta Post (Oct. 6, 2013, 11:23 AM), http://www.thejakartapost.com/news/2013/10/06/view-point-when-reformasi-devours-its-children.html [https://perma.cc/4XDA-FJGD].

183. Constitutional Court Decision 14/PUU-XI/2013 (Indonesia) (as translated in Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008 (2008) (unpublished Ph.D. thesis, University of Washington) (on file with the authors). Though the case was decided in 2013, the judgment was not released until January 2014. For a discussion of the case and surrounding controversy, see Butt, *supra* note 66, at 238–44.

184. *See* Butt, *supra* note 66, at 241 (explaining that "the Court had delayed the implementation of its decisions in this and other cases to 'avoid causing chaos'") (internal citations omitted).

the Court might well have lost the battle for constitutional supremacy. By deferring the outcome of its decision to 2019, the Court thus took an important bet that, by then, either its own stock of legitimacy would have returned to pre-2011 levels, or the Indonesian Democratic Party of Struggle (Partai Demokrasi Indonesia Perjuangan, or PDIP) or Golkar would have lost their dominance in Parliament.

IV. PROSPECTS FOR SUCCESSFUL DEFERRAL

A. Success & The Legal-Political Context

Of course, whether second-order approaches to deferral can in fact succeed will depend on a variety of context-specific factors.

Even the plausibility of deferral as a judicial strategy will depend on a range of quite localized institutional factors. Courts are often able to engage in deferral as a strategy because they are institutionally well-placed to take a longer view than political actors: unlike parliaments, almost all courts are subject to some form of doctrine of precedent. For individual judges, if they are in a majority on an issue, they can thus often expect that their decisions will outlast their own tenure on a court: the doctrine of precedent will usually mean that, at least if they are in the majority, their reasoning will carry over to future cases, even after they retire. The degree to which this applies, however, may vary significantly by country: in common law systems, notions of precedent are quite strong and formalized, whereas in civil law systems, they tend to be weaker and more informal.[185]

Likewise, judges can often afford to take a longer view than political actors because they enjoy a longer period of secure tenure. The United States is now quite exceptional in appointing members of the Supreme Court for life.[186] Most constitutional democracies impose either a form of explicit term limit on the tenure of constitutional judges, or a mandatory retirement age for all judges. Most limitations of this kind still allow constitutional judges to serve between eight and sixteen years as individuals on a court.[187] For members of Parliament or

185. *See, e.g.*, Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. Rev. 81, 86–87 (2000) ("Indeed, it is often said that the classification of a legal system as common law, as opposed to civil law, is because it is based upon a system of precedent.").

186. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J.L. & Pub. Pol'y 769, 819 (2006) ("The American system of life tenure for Supreme Court Justices has been rejected by all other major democratic nations in setting up their highest constitutional courts.").

187. *Id.* at 819–21 (describing an international trend in six to twelve year term limits and mandatory retirement ages). Indonesia, for instance, is quite exceptional in

the executive, in contrast, it is not just term limits that may prevent them continuing in office beyond a certain point. They also face a real risk of electoral defeat at the next general election. In many cases, where they do lose office, a rival political party may also seek to repeal their legislative or policy agenda, in ways that give them a shorter timeframe for influence.[188]

Whether or not deferral can *succeed* as a strategy will also depend on a variety of context-specific factors—i.e. on how judges calibrate the use of deferral as a tool in various circumstances, and on a range of factors well beyond the control of most courts.

Unlike first-order deferral, which may be endorsed and applied by courts across different cases for the lifetime of the court's existence, the idea of second-order judicial deferral is more time-limited: it applies only for so long as courts lack the political or legal support necessary to deliver decisions that they can reliably predict will be complied with. Once the necessary degree of political or legal support exists for compliance with court decisions, and that support remains stable, to make sense, second-order deferral is an approach that courts must ultimately abandon, in favor of a stronger, more immediate attempt to protect and promote democracy.

Second-order strategies are not, however, limited to a democracy's first days. Support of this kind may wax and wane with time: both democracies and courts that were once thought secure may re-emerge as fragile.[189] Similarly, countries that are generally strong democracies may have areas of fragility, where if courts intervene too decisively, they risk serious forms of democratic backlash. Even in a stable democratic trend, courts may resort to deferral; in the United States, for example, the Supreme Court honed its power of judicial review against the states before applying it against the political branches. Erin Delaney and Barry Friedman have described the way in which the

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imposing a renewable term limit of five years for members of the Constitutional Court. *See* Asshiddiqie, *supra* note 169, at 20.

188. Again, however, there is significant variation between countries as to the degree to which this is true: some countries have much longer term limits for judges than presidents, and strong norms of electoral competition for legislators, whereas in others, there are quite short fixed terms for judges, combined with an absence of formal limits on the re-election of legislators or members of the executive, and relatively weak norms of electoral competition. For a comparative analysis of executive term limits, see Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1833–43 (2011).

189. *See, e.g.*, Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary, in* FRAMING THE STATE IN TIMES OF TRANSITION 350, 350 (Laurel E. Miller ed., 2010); Andras Bozoki, *The Hungarian Shock: The Transition from Democracy?*, DELIBERATELY CONSIDERED (Feb. 1, 2011), http://www.deliberatelyconsidered.com/2011/02/the-hungarian-shock-the-transition-from-democracy/ [https://perma.cc/Z5BH-4P7X].

Court "leveraged" its vertical supremacy over the states to establish its horizontal supremacy, deferring horizontal enforcement until late into the nineteenth century.[190] Courts may thus continue to make use of second-order approaches to deferral in some contexts.

But if courts defer the consequences of their decisions across-the-board, without attention to these kinds of context specific factors, it also cannot be said they are engaged in a process of second-order judicial deferral: they are simply deferring to the legislature in these circumstances, and not to a later court with stronger legal and political support.

Similarly, courts may be able to increase the chances of successful second-order deferral by framing the substance of their reasoning in particular ways: if they reason in ways that credit the political opposition with certain legal victories they may help strengthen the morale or perceived viability of the opposition, but equally in other cases, directly antagonize the dominant political elite. Courts may also do a better, or worse, job of framing their decisions in ways that encourage a belief in law, and constitutionalism among members of civil society. The more they engender a belief in constitutional mechanisms as a mode of political contestation, the more likely they also are to encourage the kind of follow-up litigation that fulfils the promise of deferral.[191]

Ultimately, however, whether or not deferral succeeds as a strategy will depend largely on factors beyond a court's control. It will turn on factors such as whether the economy performs in a way that increases, or decreases, support for the government; what if any credible alternatives there are to the current democratic leadership either within the dominant political party or the opposition; and the degree to which there is a well-organized political opposition. These are also all factors over which courts have almost no control.[192]

Likewise, for legal doctrines to gain increased support over time, there will generally need to be a relatively well-organized legal profession, and academy, capable of debating and accepting new legal ideas. And while a court may lend support to the profession (and vice

190. Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1165 (2011).

191. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 11–13 (2004); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANNUAL REV. L. & SOC. SCI. 17 (2006) (discussing social movements and litigation).

192. *See, e.g.*, Frederick Schauer, *The Supreme Court 2005 Term: Foreword: The Court's Agenda – and the Nation's*, 120 HARV. L. REV. 4 (2006).

versa),[193] it will have little capacity to affect the basic economic and political factors that drive the strength of law schools and the legal profession within a country.

B. Dangers to Deferral & The Advantage of Surprise

There are, moreover, clear potential downsides to deferral as a strategy. At the most basic level, deferral by courts implies real costs to individuals seeking relief from a court: justice delayed may not always be justice denied, but it will certainly be justice that is less complete.[194] These are also costs that any court must weigh before deciding to rely on deferral as a strategy.

Even as political strategy, judicial deferral may also be counter-productive for courts in certain circumstances: in some cases it may disappoint powerful political actors seeking support or relief from a court, in ways that ultimately undermine rather than increase the political conditions supportive of effective judicial review.[195]

In other cases, deferral in judicial decision-making may forewarn political elites about the potential for the court to impose limits on their power in the future, in ways that provide the impetus for an immediate attack on the independence of a court, even before any actual attempt by the court to impose such constraints. One way of reading the decision of the Supreme Court of India in *Kesavananda* is that it in fact created no meaningful immediate constraint on executive power, but at the same time directly contributed to an unprecedented attack on the independence of the Indian judiciary. Immediately after the decision, Indira Gandhi announced that three senior judges in the majority in *Kesavananda* would be superseded in the appointment of the new Chief Justice.[196] Soon after the decision in *Kesavananda*, Gandhi also declared a state of emergency under Article 352 of the Constitution, thereby effectively suspending a range of constitutional guarantees for the following two years.[197]

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193. *See, e.g.*, Note, *The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power*, 123 HARV. L. REV. 1705, 1705–06 (2010).

194. Courts often employ the maxim "justice delayed is justice denied." *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 112 (1998) (Breyer, J., concurring) (stating that "'justice delayed' . . . means 'justice denied'"); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (explaining "the danger of denying justice by delay").

195. The alliance between the Supreme Court and burgeoning business interests was, for example, crucial in establishing effective judicial review. Friedman & Delaney, *supra* note 190, at 1160–62.

196. Ullah & Uzair, *supra* note 148, at 301.

197. Ullah & Uzair, *supra* note 148, at 302. Though note also that most commentators identify the original decision, at first instance, in the Election Case as the immediate trigger for the emergency. *See* Neuborne, *supra* note 119, at 492–93.

This "supersession" of the judges in the majority in *Kesavananda* had an extremely corrosive effect on norms of judicial independence in India.[198] In later cases, this single act of supersession arguably paved the way for far more extensive use of the power of promotion and transfer in respect of judges, to influence patterns of judicial decision-making during the emergency in a decidedly antidemocratic direction.[199] During the emergency itself, seven high court benches held that habeas corpus petitions could still be granted to protect against the danger of arbitrary detention. The Supreme Court, however, overturned this in *ADM Jabalpur v. Shiv Kant Shukla*,[200] finding that habeas was entirely suspended for the duration of the emergency. The connection between this holding and the practice of supersession was also quite clear: not only did it follow closely on the supersession of 1973, but following the decision, the sole judge who dissented in the case, Justice Khanna, was also superseded in favour of Justice Beg, who authored the opinion for the majority, in the next appointment of the chief justice.[201]

The broader effects of the emergency were also extremely wide-ranging for individuals, and for constitutional democracy in India. As Bert Neuborne notes, freedom of expression and association were almost completely removed: the government engaged in widespread censorship of the press, cut off electricity to prevent newspaper coverage of its actions, and prohibited people from gathering in groups of more than five.[202] Members of the political opposition were also arrested *en masse*, and more than 100,000 people placed in preventative detention.[203] The government also sought to cut of access to the courts

198. There is a strong convention in India that the chief justice should be the senior most sitting judge. Otherwise, there is clear potential for the executive indirectly to influence behavior on the Court, via more selective or strategic appointments to the position of chief justice. This also intersects with the modern practice, in India, of the SCI itself playing a dominant role in the process of appointments. *See* Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty, in* THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 168–73 (Pran Chopra ed., 2006); MOHAN KUMARAMANGALAM, JUDICIAL APPOINTMENTS: AN ANALYSIS OF THE RECENT CONTROVERSY OVER THE APPOINTMENT OF THE CHIEF JUSTICE OF INDIA (1973). This norm, however, was directly challenged by Gandhi in the supersession following *Kesavananda*.

199. *See, e.g.*, R.V.R. Chandrasekhara Rao, *Mrs. Indira Gandhi and India's Constitutional Structures: An Era of Erosion*, 22 J. ASIAN & AFR. STUD. 156, 168 (1987) (explaining that more than a formal attempt to cut down judicial power [under Gandhi], it was the nature of the pressure that the Judiciary was made to feel from the executive that proved pernicious).

200. AIR 1976 SC 1207 (India).

201. *See* Sudarshan, *supra* note 143, at 54–55.

202. Neuborne, *supra* note 119, at 492. *See also* Jyotirinidra Das Gupta, *A Season of Caesars: Emergency Regimes and Development Politics in Asia*, 18 ASIAN SURV. 315, 322–23 (1978); Rao, *supra* note 199, at 166–67.

203. Neuborne, *supra* note 119, at 492.

for individuals seeking to assert their fundamental rights under Article 19 of the Constitution.[204]

The optimal approach by a court, in this circumstance, may thus ultimately be either *complete* deferral of all forms of judicial review—both substantive and remedial—or else a form of intervention based on far more sudden, unanticipated—and immediately forceful—judicial intervention.[205]

CONCLUSION

Nonetheless, once examined in light of the *Marbury* strategy of assertion of judicial authority without direct confrontation, it is striking how many national examples of successful judicial stewardship fall into this pattern. Consider the example of the development of an immutable constitutional commitment in Israel, particularly in light of the absence of a written constitutional text.[206] Israel has a statutory Basic Law, but it does not have the normal form of textual rigidity associated with formal constitutions. Yet the Court has imparted to the core principles of democratic governance in the Basic Laws a constitutional authority, and correspondingly claimed the institutional capacity of the judiciary to enforce those governance commitments. The leading case establishing the inability of ordinary legislation to disrupt this core constitutional commands legislation is *Bank Mizrahi v. Migdal Cooperative Village*,[207] a decision in which the Supreme Court forcefully asserted "that it viewed the Basic Laws as Israel's formal Constitution and that, as a result, it had the power of judicial review over primary legislation."[208] Yet here, as in India, a challenge to property rights under the Basic Law failed and the Israeli Court, again as in India, asserted the doctrine of structural guarantees of democracy in a case that upheld challenged legislation.

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204. *Id.*

205. Which view one takes in this context depends in part on the time-frame for assessment: in the short-term, the Supreme Court of India's willingness to defer the consequences of its decision in *Kesavananda* may have had troubling consequences, whereas in the longer-term (i.e. 1977 or afterwards), it may have to helping secure effective limits on legislative action.

206. Though for signs that the immutability of this commitment may also be under renewed challenge, see, for example, Gabe Kahn, *Ministers Threaten Legislative Override of the Supreme Court*, ISRAEL NATIONAL NEWS (Jul. 5, 2012), http://www.israelnationalnews.com/News/News.aspx/155551#.Vun8RuJ96Uk [https://perma.cc/XV4R-6CHW].

207. 49(4) PD 221 (1995) (Isr.).

208. Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 499 (2012). Our thanks to Aharon Barak for bringing the analogy to Israel to our attention.

Indeed, a focus on judicial deferral, and its many modes and functions, encourages a different view of a wide variety of existing constitutional decisions and practices.

South Africa is a country in which the constitutional court has played a large role in democratic politics, despite the increasingly dominant rule of the ANC. In some cases, the court has navigated this tension by avoidance of certain constitutional issues, or deference to the executive or National Assembly.[209] But in others, it has engaged in various forms of deferral. The CCSA has issued dozens of decisions like *Fourie* involving suspended declarations of invalidity.[210] In its first ever, the *First Certification Case,* involving the validity of the democratically drafted 1995-96 Constitution, the Court engaged in a classic form of *Marbury*-style deferral: with some important, but relatively minor, exceptions, the CCSA upheld the constitutional draft as compatible with the constitutional principles agreed by the parties who negotiated the interim Constitution. Yet in doing so, the Court also laid out principles as to how the Constitution would need to be interpreted, consistent with his finding of validity.[211]

The CCSA has also arguably used, or benefited from, even more implicit forms of second-order deferral. In many of the early cases before the court, legislation under challenge was apartheid-era legislation no longer supported by the government or the majority of the National Assembly. In striking down this legislation, the court was thus effectively rendering decisions with few immediate political consequences. Yet in almost all these cases the court also began to develop a jurisprudence with the capacity to constrain national legislative majorities in the future. A focus on the idea of deferral, and all its varieties, helps us see this practice—of a new court focusing on invalidation of old run new statutes—in a new light,[212] as an implicit way in which courts may increase the acceptance and effectiveness of their jurisprudence in conditions of judicial and democratic fragility.

Another aspect of the South African experience highlights the close relationship between deferral and other questions of constitutional

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209. *See, e.g.*, Samuel Issacharoff, *The Democratic Risk to Democratic Transitions*, 5 CONST. CT. REV. 1 (2013); Choudhry, *supra* note 40.

210. *See, e.g.*, *S v. Ntuli*, 1996 (1) SALR 1207 (CC) (S. Afr.); Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531, 560 (1997) (discussing the Court's decision to "suspend the order of invalidity so that Parliament would have time to devise a means for dealing with the increased number of appeals").

211. *See generally* Matthew Chaskalson & Dennis Davis, *Constitutionalism, the Rule of Law, and the First Certification Judgment*, 13 S. AFR. J. HUM. RTS. 430 (1997).

212. *Cf.* William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (discussing statutory interpretation and old versus new statutes).

temporality: many of the early cases decided by the CCSA involved the interim 1993 Constitution. Interim or transitional constitutional arrangements are also closely related to deferral in constitutional decision-making. While on one level 'interim' arrangements impose time-limits rather than delays on the consequences of particular decisions, in effect they defer the making of a more *final* constitutional decision.[213] Dynamics of this kind also as much to judicial decision-making, so to democratic constitutional drafting.

In the United States, the most recent example of this involves the twenty-five year time-limit imposed by Justice O'Connor in *Grutter*,[214] on the validity of various race-conscious admission programs, such as those used by the University of Michigan Law School. In some ways, this decision was a form of temporary measure of the kind contemplated by international human rights law, which allows a more deferential application of standards of strict scrutiny for some period, in the interests of achieving racial (or gender) justice.[215] But in another, it was implicitly a form of first-order deferral of strict scrutiny, for a period designed to provide educational and governmental institutions with a realistic opportunity to develop alternative ways of recruiting a diverse body of students or employees.

Our aim in highlighting the pervasiveness of deferral as a practice is not to counsel that deferral is always the wisest course for a court. For one thing, whether or not deferral can succeed in shoring up the effectiveness of judicial review in defense of democracy will depend on a range of quite context-specific factors—including the strength of doctrines of precedent, and the relative institutional tenure and security of judges, compared to other actors. It will also depend on both how courts deploy deferral as a strategy, and the way in which court decisions interact with largely exogenous shifts in background economic, political and legal conditions. For another, deferral will also often involve real costs, which must be weighed by courts before deciding to delay the legal or political consequences of their decisions.

The usefulness, or relevance, of different modes of deferral will also depend on quite specific background legal and political conditions in a society. First-order approaches to deferral may be a recurring feature of judicial review across countries and across time—because all

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213. *See, e.g.*, SOFIA RANCHORDAS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE (2014); Ozan O. Varol, *Temporary Constitutions*, 102 CAL. L. REV. 409 (2014); Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

214. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

215. Justice Ginsburg, for example, cited both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in her *Grutter* concurrence. *Grutter*, 539 U.S. at 344.

courts, at some point, will face questions about legal continuity and the practical implementation of their decisions. Many will also face questions about the democratic legitimacy of their decisions, in the face of reasonable disagreement among citizens and legislators.

Second-order approaches to deferral, however, are far more time and context-dependent. As a tool, they will be most relevant to courts, or judges, at times when their own institutional power or effectiveness is at risk[216]—often because dominant political parties, or temporary political majorities, are strongly opposed to particular court decisions. The longer the history of constitutional review in a country, the greater the institutional capital a court may have to draw on, in resisting these risks. But the risk may also reappear for a court generally, or in a specific case, depending on background political conditions.

What cannot be gainsaid, however, is the broad use of a variety of different modes of judicial deferral practices by constitutional courts worldwide. Deferral may take different forms across the world, but it is a common feature of decision-making in almost all constitutional jurisdictions that have seen the rise of powerful constitutional courts, playing a central role in policing the boundaries of democracies. Deferral, by these courts, has also clearly served second-order as well as first-order functions or purposes.

The insight goes beyond the mechanisms of deferral. Part of the logic of the political question doctrine was to limit the potential areas of direct conflict between the judiciary and the power branches of government. The political question doctrine divided between a categorical prohibition of politics as jurisdictionally beyond the reach of judicial action, and a more pragmatic, prophylactic view that cautioned against excessive judicial engagement but without the hard boundary lines.

In mature, stable democracies, constitutional courts have greater power to assert their right to review while following a "strategy of reassurance" to both the political powers that be and to potential constitutional challengers.[217] In such circumstances, reasoned exercises of judicial authority are accepted as an integral part of the governance structure, and increasingly so. However, such courts rarely confront an existential moment where pushing against political power may

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216. *See* Javier A. Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002*, 10 DEMOCRATIZATION 70, 88 (2003) (describing the Chilean "courts' refusal to exercise their powers of judicial control of the constitution [as] a reasonable response by a judicial system that gives priority to its survival as an independent branch of government.").

217. *See* Wojciech Sadurski, *"It All Comes Out in the End": Judicial Rhetorics and the Strategy of Reassurance,* 7 OXFORD J. LEG. STUD. 258, 259–60 (1987) (describing a strategy of forcefully asserting reasons that would seemingly lead to the opposite of the actual holding).

precipitate a confrontation that the courts cannot win, at least not in the short term. Even without a general prescription of what should be done in any particular circumstance, we do note the prevalence of the way in which many of the most successful pro-democracy courts accreted their authority cautiously—judicially, if one will. Living to fight another day proves to be an attractive option in judging as in all matters of statecraft.